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In The

# Supreme Court of the United States

October Term, 1992

SIMPSON PAPER (VERMONT) COMPANY,

*Petitioner,*

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB,

*Respondents.*

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Vermont

## JOINT RESPONSE OF THE STATE OF VERMONT, DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE SIERRA CLUB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

The Connecticut River is New England's grandest and most important river. Rising in Northern New Hampshire, it flows the length of Vermont and New Hampshire and continues south through Massachusetts and Connecticut, where it finally meets the Atlantic.

The Connecticut is also a working river. It has been extensively developed to serve New England's industrial, waste disposal and electrical needs. The enactment of the

Clean Water Act, however, has obligated those who discharge into the River to share in the restoration and maintenance of its "chemical, physical and biological integrity." 33 U.S.C. § 1251(a).[1]

The Georgia-Pacific Corporation and its successor, the Simpson Paper Company (hereinafter referred to as "Simpson"), however, continue to strenuously avoid their obligations under the Clean Water Act. Simpson owns and operates the Gilman Dam in Lunenburg, Vermont which, together with its impoundment, were built in the early 1900s. Pet. App. 6a, 19a. It is operated as a hydroelectric generating facility; electricity produced by the dam powers Simpson's adjacent paper mill. Pet. at 11. The dam severely harms the Connecticut River's chemical, physical and biological characteristics by flooding several miles of the River and altering its natural flow. Pet. App. 7a-12a, 21a-26a. All water that was oxygenated as it flowed over the dam site's natural drop in elevation is now impounded and diverted under the dam and through its turbines and deprived of the natural aeration process. Pet. App. 20a-21a. What was once highly oxygenated, fast flowing white water is now flat water. What was once a riverine ecosystem is now a lake-like ecosystem.

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[1] The report of the House committee on Public Works which accompanied the House bill from which the Clean Water Act arose states that "the word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of the ecosystem is maintained." H.Rep.No. 92-911, 92nd Cong. 2d Sess. 76-77 (1972), reprinted in 1 Leg. Hist. 753, 763-64. *See also Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F.Supp. 278, 286 (W.D. La. 1981).

The dam's operation is governed by a license issued by the Federal Power Commission (now the Federal Energy Regulatory Commission) in 1965 with an effective date retroactive to January 1, 1941 and an expiration date of December 31, 1990.[2] Pet. at 11. That license adopted operating standards developed in the 1930s when the dam was first converted to a hydroelectric facility. Because it was issued well before the 1972 enactment of the Clean Water Act (CWA), the 1941 license does not contain any provisions to protect the Connecticut River's water quality.

In September of 1988, Simpson applied to the FERC for relicensure of the dam and simply proposed to continue operating the dam under the conditions of its 1941 license. Pet. App. 23a.

On August 3, 1988, as part of its application for relicensure, Simpson requested a water quality certificate from the Vermont Department of Environmental Conservation. *See* 33 U.S.C. § 1341(a)(1); 18 C.F.R. § 4.38(c)(2) (1988); 10 Vt.Stat.Ann. § 1004 (1987)[3]. Again, Simpson asked to continue operating the dam under the same terms as set forth in its 1941 license. Pet. App. 15a-16a. Simpson made no proposals to comply with the Clean

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[2] On January 17, 1991, the FERC issued an annual license allowing Simpson to continue operating the Gilman Dam under the terms of the 1941 license. *See* 16 U.S.C. § 808. The FERC is apparently awaiting the outcome of this matter before issuing Simpson's new license.

[3] The Department of Environmental Conservation is within the Vermont Agency of Natural Resources (VANR). 3 Vt.Stat.Ann. § 2802(a)(5) (1987).

Water Act or to otherwise address the dam's impact on water quality.[4] *Id.*

The portions of the Connecticut River relevant to this matter are Class B waters.[5] Pet. App. 3a, 11a, 20a-21a. Class B waters must be managed to assure compliance with water quality criteria established by Vermont's Water Quality Standards. The one criterion at issue in this matter is for dissolved oxygen (DO); the criterion requires that DO levels never fall below 6.0 mg/1 or 75% saturation. Vermont Water Quality Standard (Vt. WQS) 3-01(B)(1)(a) (1987).

The Water Quality Standards also establish beneficial values and uses for which the River must be managed.[6] Class B waters must be managed so that they consistently

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[4] Contrary to Simpson's claims, Pet. 13-14, and despite the DEC's repeated and timely entreaties, Simpson made no effort whatsoever to address the DEC's concerns over dissolved oxygen levels until well after Vermont had issued Simpson's Water Quality Certificate. Indeed, the Superior Court found that "the record before the DEC is bare of any formal presentation by plaintiffs of their proposed management plan despite knowledge as early as 1983 that DO deficits existed downstream of the dam." Pet. App. 15a-16a.

[5] A limited segment of the Connecticut downstream of the Gilman Dam was a Class C water because of the discharge of Simpson's mill wastes. Vermont has since eliminated Class C waters, 10 Vt.Stat.Ann. § 1253(b) (1987); this limited segment of the river is now considered a "waste management zone." 10 Vt.Stat.Ann. § 1252(d) (1991). The dam itself and the reach of the River affected by the DO deficits are, and at all times relevant to this matter have been, Class B waters.

[6] The Vermont Water Quality Standards refer to designated uses, 33 U.S.C. § 1313, as "beneficial values and uses."

exhibit good aesthetic value, provide high quality habitat for aquatic biota, fish and wildlife, and may be used for swimming and recreation. Vt. WQS § 3-03(A).

Vermont issued Simpson's water quality certificate on July 28, 1989. Pet. App. 28a. The certificate requires Simpson to spill 210 cubic feet of water per second (cfs) over the crest of the dam from June 1 through October 15 of each year for the express purpose of meeting Vermont's DO criterion. Pet. App. 23a-24a. In addition to the numerous findings relating to compliance with the DO criterion, Vermont found that spillage "will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period." Pet. App. 26a.

Simpson, maintaining that it should be allowed to continue its "historical mode" of operation of the dam, petitioned the Vermont Superior Court for review of its water quality certificate. Record, Second Amended Complaint for Review (1/4/91) at 7. Simpson's exclusive claim, as framed by its Second Amended Complaint, related to compliance with Vermont's DO criterion. *Id.*

The Superior Court affirmed the water quality certificate. Pet. App. 17a. It made numerous, detailed findings supporting the DEC's conclusion that DO deficits caused by the dam necessitated the 210 cfs spillage requirement. Pet. App. 6a-12a. The Superior Court also held that "[t]he aesthetic determination forms a strong independent basis upon which to uphold the 210 cfs continuous spill requirement." Pet. App. 14a.

Simpson appealed to the Vermont Supreme Court. Simpson's primary claim was that there was insufficient

evidence in the record demonstrating that spillage was necessary to alleviate violations of Vermont's DO criterion. Resp. App. 18a-25a, 44a-58a. The Vermont Supreme Court affirmed.

## REASONS FOR DENYING THE PETITION

Certiorari should be denied because, contrary to petitioner's assertions:

1. The Vermont Supreme Court's judgment rests on adequate, independent state grounds not challenged by Simpson.

2. The Vermont Supreme Court affirmed a proper exercise of state authority under § 401 of the Clean Water Act.

3. There is no division among any courts concerning the aesthetics and recreation issue addressed by the Vermont Supreme Court.

4. Arguments raised by Simpson were not raised before the Vermont Supreme Court, and in any event are groundless.

### I. THE VERMONT SUPREME COURT'S JUDGMENT RESTS ON ADEQUATE, ALTERNATIVE STATE GROUNDS NOT CHALLENGED BY SIMPSON

Although the Vermont Supreme Court's *Entry Order* rests upon two independent, substantive grounds, Simpson's petition seeks review of only one of these grounds. Simpson does not dispute the Vermont Supreme Court's

primary conclusion that "[t]he spillage requirement was amply supported by the evidence" – evidence that details the need to continuously spill 210 cfs to comply with the dissolved oxygen criterion established by Vermont's Water Quality Standards.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This principle rests on "the jurisdictional concern [that the Court] not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' " *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (quoting *Herb*, 324 U.S. at 126). The Court's power pursuant to a writ of certiorari "is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at 126; *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2554 (1991).

Simpson bears the burden of establishing that the Vermont Supreme Court's judgment does not rest on independent state grounds. *Michigan v. Long*, 463 U.S. at 1042, n. 8; *Durley v. Mayo*, 351 U.S. 277, 285 (1956). Simpson cannot meet that burden, because the Vermont Supreme Court's decision provides a concise and "plain" statement of the independent state grounds upon which it rests. *See Michigan v. Long*, 463 U.S. at 1044.

Simpson's claim that the Vermont Supreme Court affirmed Simpson's water quality certificate "on the sole ground that aesthetics and recreation were an appropriate basis for the spill condition," Pet. 16, is without

foundation. Simpson framed the two substantive issues to which the Court responded: "Plaintiffs lastly contend that the spillage requirement was not supported by the evidence *and* that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement." Pet. App. 3a (emphasis added).

The Court ruled that the spillage requirement "was amply supported by the evidence." Pet. App. 3a. The evidence with which Simpson took issue related exclusively to compliance with Vermont's dissolved oxygen criterion. Resp. App. 18a-25a, 44a-58a. The Vermont Supreme Court thus concluded that compliance with the DO criterion warranted the spillage requirement.

The Court then held that "[n]ot only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement." Pet. App. 3a. The reference to ease of administration and monitoring was in direct response to Simpson's claim that its scheme to monitor and manage DO levels in the Connecticut River was arbitrarily rejected by the DEC. Resp. App. 16a, 23a-25a, 37a-44a. Indeed, the Superior Court's finding upon which the Vermont Supreme Court's reference is based states that:

> the [210 cfs spill flow] proposed by the VANR [Vermont Agency of Natural Resources] uses spill flow at the dam, an easily gaged [sic] and monitored parameter, to meet specific future DO goals downstream of the project. *The applicant's proposed water quality management plan, which depends on an unproven predictive water quality model, would be difficult to monitor and enforce for*

> *compliance with the goal of maintaining DO at the sag point.*

Pet. App. at 17a (emphasis added by the Superior Court).

Thus, even in addressing aesthetics and recreation, the Vermont Supreme Court made it clear that its holding on this issue was independent of compliance with the DO criterion. Furthermore, the words, "not only" plainly demonstrate that the Court did "not only" consider aesthetics and recreation as a basis for the spillage condition.

Simpson, despite having framed each of the issues to which the Vermont Supreme Court responded, claims to be "without explanation" for the Court's reference to "ease of administration and monitoring." Pet. 16 n. 35. Nor does Simpson offer an explanation for the Court's conclusion that spillage is amply supported by the evidence. The explanation is plain and simple – the Vermont Supreme Court based its judgment on compliance with Vermont's DO criterion as well as aesthetics and recreation. Simpson's petition should therefore be denied. *See Michigan v. Long*, 463 U.S. at 1042.

## II. A STATE WATER QUALITY STANDARD NEED NOT BE QUANTITATIVE TO BE AN "APPROPRIATE REQUIREMENT OF STATE LAW."

Even if the Vermont Supreme Court's clear ruling concerning the quantitative dissolved oxygen criterion could be ignored, the challenged certification must still be upheld as a valid application of Vermont's power to apply its non-quantitative water quality standards – specifically, that portion of the standards that requires "water of a quality which consistently exhibits good aesthetic

value . . . and recreation." Vermont Water Quality Standards § 3-03, quoted at Pet. App. 3a.

Simpson's entire argument concerning aesthetics and recreation rests on a misrepresentation of what was actually decided below. According to Simpson, "[i]t is evident that the only concern of the Vermont tribunals regarding aesthetics and recreation was for the scenic vista which supposedly would be presented by water spilling over the Project crest gate to recreating tourists." Pet. 23-24. To the contrary, the DEC certificate clearly states:

> Spillage of 210 cfs *for protection of downstream water quality* during the period June 1 through October 15 will also serve to restore to a degree the aesthetics of this river reach. This is particularly important during the high public recreational use period.

Pet. App. 26a (emphasis added). It is this finding – not Simpson's imaginary finding concerning the aesthetics of cascading water – that was affirmed by the Vermont courts.

Once the clear water quality basis for the spillage condition is recognized, Simpson is left with the far narrower assertion that only *quantitative* water quality standards can form a proper basis for a § 401(d) condition on a certificate. Pet. 22 ("Management goals such as promotion of aesthetic 'values' and recreational 'uses' are to be achieved through implementation of specific, quantifiable 'criteria.' "). But § 401(d) authorizes conditions to ensure compliance with "any other appropriate requirement of State law," not "any other appropriate *quantitative* requirement of State law."

Indeed, not just designated uses, but criteria also, may be non-quantitative. 40 C.F.R. § 131.3(b) (1991) (criteria may be "expressed as constituent concentrations, levels, *or narrative statements* representing a quality of water that supports a particular use") (emphasis added). Simpson's insistence on quantitative rules would thus mean that some water quality *criteria* could be neither implemented nor enforced.

Moreover, excluding the non-quantitative portions of a state's water quality standards from § 401(d) would produce results opposite to those desired by Simpson. Under § 401(a)(1), a state must deny certification outright if the proposed activity does not comply with § 303 of the Act.[7] Section 303, in turn, expressly provides that a state water quality standard "shall consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (emphasis added).

Thus, if an applicant's discharge would violate *either* the non-quantitative designated uses *or* the quantitative criteria, the state must deny certification. If, as suggested by Simpson, Vermont was precluded from imposing conditions to assure compliance with its Standards, Vermont would have no choice but to deny certification under § 401(a)(1) and thereby preclude the FERC from issuing a

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[7] Simpson does not contend that Vermont's consideration of aesthetics and recreation stems from any state law other than Vermont's Water Quality Standards. Simpson concedes that Vermont's Standards were approved by the E.P.A. pursuant to § 303 of the Act and conform to the format imposed by EPA's regulations. Petition at 24.

license.[8] Surely a license with conditions serves Simpson's interest better than no license at all.

Simpson argues that, as a matter of law, compliance with the numerical criteria constitutes full compliance with any non-quantitative designated uses. Again, Simpson's argument finds no support in the Clean Water Act, which indicates merely that criteria are "based upon" designated uses, 33 U.S.C. § 1313(c)(2)(A), *not* that compliance with the criteria necessarily guarantees compliance with those uses. Indeed, EPA's regulations specifically require that dams be operated to attain designated uses, 40 C.F.R. § 131.10(g)(4) (1991), and provide that "[w]hen criteria are met, water quality will *generally* protect the designated use," 40 C.F.R. § 131.3(b) (emphasis added). The EPA thus recognizes that there will be instances where the use remains unprotected notwithstanding compliance with the criteria.

Simpson's argument thus boils down to the assertion that the present case is not one of those instances – *i.e.*, that the challenged spillage condition is not necessary to ensure compliance with Vermont's designated uses. Pet. 25 ("The DEC never proved or even claimed that DO levels affect aesthetics or recreation.") This contention raises no federal issue, but rather concerns only Vermont's interpretation and application of its own Water Quality Standards.[9]

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[8] § 401(a)(1) ("No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.")

[9] Because the CWA expressly preserves the states' right to adopt more stringent requirements than those imposed by

This Court's opinion in *Arkansas v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 1046 (1992), *cited in* Pet. 22-23, is of no assistance to Simpson. In that case Oklahoma challenged a permit for a discharge in Arkansas. Under § 401(a)(1), a state has the right to issue a water quality certificate only if it is the state "in which the discharge originates or will originate." Because the discharge originated in Arkansas, Oklahoma was relegated to § 401(a)(2), which did not require Oklahoma's certification as a prerequisite to permit issuance, but rather required *EPA* to make the applicable decisions about compliance with Oklahoma's water quality standards.[10] These circumstances provide the context for the Court's observation that *"at least insofar as they affect the issuance of a permit in another State,* the Oklahoma standards have a federal character." *Arkansas v. Oklahoma,* 112 S.Ct. at 1059 (emphasis added).

In this case, by contrast, the discharge originates in Vermont,[11] so that section 401(a)(1) applies rather than § 401(a)(2). Under 401(a)(1), the Vermont DEC, not EPA, is charged with the duty of interpreting and applying Vermont's Water Quality Standards. Whether Vermont

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federal law, § 510, there is no basis for this Court to hold that Vermont's standards – either on their face or as interpreted and applied by Vermont – are too stringent.

[10] CWA § 401(a)(2) ("the *licensing or permitting agency* . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.") (emphasis added). In *Arkansas v. Oklahoma,* the "licensing or permitting agency" was EPA itself.

[11] Specifically, the penstock (through which water from above the dam is discharged into the river below the dam) is located in Vermont.

has correctly interpreted its Standards poses no federal issue.

## III. THERE IS NO CONFLICT AMONG THE STATE COURTS CONCERNING THE ENFORCEABILITY OF "DESIGNATED USES" UNDER CWA § 401(d).

Simpson asserts that state courts are "divided;" while some have "properly interpreted § 401 to preclude imposition of conditions, or outright denial of a certification, on non-water quality related grounds[,] . . . [t]he Vermont Supreme Court has ruled to the contrary." Pet. 19 (footnote omitted). The Vermont Supreme Court did no such thing. Rather, it upheld application of the aesthetics and recreation provisions of Vermont's *Water Quality* Standards. Pet. 3a.

On the true issue posed by Simpson's petition, none of the cases Simpson cites (nor any others of which respondents are aware) creates a conflict: none rules that § 401(d) conditions must be based only on the quantitative or numerical portion of a state's water quality standards.

Indeed, one of Simpson's cited cases actually undercuts its position. In *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274 (Or.App. 1986), the Court held that § 401(d) conditions must go *beyond* water quality standards and include water-quality-related portions of county land use regulations:

> Many uses of land may affect water quality, even if they do not immediately result in direct discharges to the state's waters . . . If [the

> state] . . . grants petitioners' request for a certificate, it must require, as a condition of that certificate, that petitioners comply with the water-related portions of the Deschutes County land use regulations.

717 P.2d at 1279.[12]

And in a case not cited by Simpson, Maine's highest court rejected the narrow interpretation of "designated uses" advanced by Simpson here:

> Bangor Hydro contends that there is an irrebuttable presumption that waters are "suitable for" their designated uses if they meet the numerical criteria of section 465(4)(B) [of the Maine water quality standards] and that the Board has no charter to inquire whether the designated uses actually exist, or can exist, in a river. We disagree.
>
> . . . We cannot conclude that the designated uses included in section 465 are mere surplusage. The level of detail bespeaks a considered determination of the public interest. This legislative determination would be rendered a nullity if the agency responsible for reviewing compliance could consider only the numerical criteria and

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[12] The court also rejected a claim by conservationists that because hydroelectric development was not specifically included in the state's § 303 designated uses, the state was barred from granting a certificate to a hydroelectric project. *Id.* at 1279-80. The court did not hold or suggest, however, that the state was barred from including § 401(d) conditions designed to protect those designated uses. Certainly if non-quantitative land use regulations are properly within the scope of § 401(d), non-quantitative water quality standards must be as well.

> not whether the designated uses actually were achieved in a particular river.

*Bangor Hydro-Electric Co. v. Board of Environmental Protection*, 595 A.2d 438, 442 (Me. 1991) (footnote omitted). *Accord, id.* at 442 n.4 ("The statutory statement of purpose suggests the intent to include the narrative criteria as an integral part of the water quality standards that the Board must consider in its review.")[13]

Likewise, none of the other cases cited by Simpson hold or even suggest that non-quantitative water quality standards do not constitute a valid basis for a § 401(d) condition. The two New York cases hold that § 401 does not empower the states to consider matters "unrelated to their water quality standards," but do not hold that non-quantitative portions of state standards are unenforceable. *Power Authority v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726, 730 (1983); *de Rham v. Diamond*, 32 N.Y.2d 34, 295 N.E.2d 763, 768 (1973). Indeed, in a case not cited by Simpson, *Long Lake Energy v. Dept. of Env. Cons.*, 563 N.Y.S.2d 871 (A.D.3 Dept. 1990), a New York court relying on *Williams* and *de Rham* held that enhancement of a fishery and associated aquatic resources is within the purview of the § 401 process.

The Connecticut case (which is currently on appeal) overturned an outright denial of a § 401 certificate, where

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[13] Because the case before the Maine Court involved only a state request for information, the Court did not rule on whether the State could ultimately base a § 401(d) condition on the designated uses. 595 A.2d at 443. Nonetheless, the Court's reasoning strongly suggests that such a condition would be upheld.

the denial was based on aesthetic concerns relating to the *quantity* of water in the river. *Summit Hydropower v. Commissioner of Environmental Protection*, LEXIS 2177, *23, (Conn. Super. July 20, 1992) ("The Commissioner concluded . . . that the viewing of Cargill Falls is a recreational use and that the project would have a detrimental effect on the aesthetic quality of viewing the falls by reducing the water level of the natural river flow."). The court specifically noted that "[t]he Commissioner does not claim that the project will in any way affect the aesthetics of the water itself, namely, how the water looks." *Id. Accord, id.* at *27 ("nor does the Commissioner claim that the proposed project will affect the water quality of the Quinebaug River in any way").

Finally, the Pennsylvania case held that § 401 does not encompass "the impact of physical changes in the river on aquatic resources and the effect of the project on wetlands and fish migration." *Pennsylvania Dept. of Environmental Resources v. City of Harrisburg*, 578 A.2d 563, 567 (Pa.Cmwlth. 1990). The court did not address aesthetics, and certainly did not hold that only numerical water quality criteria are enforceable under § 401(d).[14]

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[14] The Pennsylvania and Connecticut courts suggested that § 401 only applies to a "discharge of a pollutant." *Summit*, LEXIS 2177 at *27; *Pennsylvania DER*, 578 A.2d at 567. As indicated below, this issue is not properly before this court, *see* pp. 19-20, *infra*, so any conflicts among the state courts concerning it have no bearing on the advisability of certiorari here.

## IV. CLAIMS NOW RAISED BY SIMPSON WERE NOT ADEQUATELY AND SQUARELY PRESENTED TO THE VERMONT SUPREME COURT

The other arguments raised by Simpson in support of its Petition were not raised before the Vermont Supreme Court. This Court has made it clear that it will only entertain issues that were both raised and adequately and squarely presented before the state courts. *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988); *Webb v. Webb*, 451 U.S. 493 (1981). "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute . . . was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law."[15] *Webb*, 451 U.S. at 501 (emphasis in original). Vermont law, in turn, requires that an issue be raised and "fairly presented" to be preserved for appellate review. *Lanphere v. Beede*, 141 Vt. 126, 129, 446 A.2d 340, 341 (1986). The respondents enumerate each of these claims and, though each is precluded, offer a brief substantive response to each.

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[15] Rule 14.1 (h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them . . . and such pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." Simpson utterly failed to comply with its obligations under this rule insofar as the claims addressed in this section are concerned.

## A. THE CLEAN WATER ACT

Relying on the statutory definition of the term "discharge" (the key term in § 401(a)(1) that triggers the applicability of the state certification requirement), Simpson suggests that state jurisdiction under § 401(a)(1) is lacking because reduced dissolved oxygen levels attributable to a dam do not constitute a "discharge of a pollutant or pollutants." Pet. 21-23, n. 51, *quoting* CWA § 502 (16). Simpson, however, affirmatively stated to the Vermont courts that it "no longer contend[s] that the State of Vermont has no authority at all to regulate the Gilman Dam through the § 401 process, because the Dam and its 'run-of-river' operation is not a 'discharge' for purposes of state and federal law."[16] Motion to Amend Complaint

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[16] Simpson contended before the Vermont Supreme Court that the provisions enumerated in section 401(a)(1) "plainly relate to objective water quality criteria *and* elimination of water *pollution*." Resp. App. 59a (emphasis added). "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). A dam is unquestionably a man-made alteration of the physical, chemical (e.g. DO) and biological integrity of water, and thus causes "pollution". *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (EPA concedes that dams cause "pollution"). Indeed, Simpson conceded that "Vermont has duly enacted applicable water quality standards and there is no dispute that those standards and the [Clean Water] Act generally are applicable to the Gilman Dam." Resp. App. 60a. By conceding not only the applicability of § 401 to "pollution," but the applicability of Vermont's Water Quality Standards and the Clean Water Act to the Gilman Dam, Resp. App. 59a-60a, Simpson further waived its ability to presently claim otherwise.

(1/4/91) (granted, Jan. 16, 1991). Simpson cannot now raise this issue.

In any event, Simpson's quotation leaves out a key word of the definition: "The term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." § 502(16) (emphasis added). *See* 2A Singer, *Sutherland Statutory Construction* § 47.07, at 152 (1992) ("It has been said 'the word "includes" is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated . . . .' ") (citation omitted).[17]

Simpson also neglects to mention that the FERC's regulations expressly require compliance with the § 401(a)(1) state certification requirement as a prerequisite to issuance of an FERC hydroelectric license. 18 C.F.R. § 4.38(c)(2) (1988).

## B. THE FEDERAL POWER ACT

Simpson's petition also claims, for the first time, that "Vermont's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the Federal Power Act (FPA) by implication." Pet. 26-27. Simpson never even cited the Federal Power Act to the Vermont Supreme Court. *See Bankers Life and Casualty*, 486 U.S. at

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[17] *National Wildlife Federation v. Gorsuch, cited in* Pet. 23 n.51, is of no assistance to Simpson because it construes § 402(a)(1) (which applies to "the discharge of any *pollutant*") (emphasis added), not § 401(a)(1) (which applies to "any discharge into the navigable waters").

78. Simpson certainly never asserted that Vermont's Water Quality Standards or the water quality certificate were "repugnant" to the Federal Power Act. 28 U.S.C. § 1257(a). Simpson cannot now, for the first time, raise such issues. *Id; Webb*, 451 U.S. at 496.

In any event, this claim has no merit. There is nothing "impli[ed]" about the requirement for a state water quality certification, the state's power to attach conditions to that certification, or the state's power to adopt and apply water quality requirements stricter than federal law: all are explicit on the face of §§ 401 and 510. It is *Simpson* who would repeal a congressional enactment, by reading into the Clean Water Act limitations that Congress did not create. Indeed, Simpson's argument would contravene not only the letter of the CWA, but also its underlying intent to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).[18]

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[18] None of the Federal Power Act cases cited by Simpson (Pet. 27-28) construe the Clean Water Act, and certainly none provides any basis for disregarding the clear terms of CWA §§ 401 and 510.

Equally misplaced is Simpson's argument (Pet. 28) that FPA § 10(j) limits state authority to impose fish and wildlife conditions. Simpson decided not to challenge the certificate's fish passage condition in the Vermont courts (Pet. 14 n. 31), and, as stated above, never cited any provision of the Federal Power Act to the Vermont Supreme Court. Accordingly, Simpson may not raise that challenge here.

Finally, Simpson erroneously suggests that CWA § 102(b)(6) limits Vermont's authority to include spillage requirements in a § 401(d) certification. Pet. 26 & n. 53. Again, Simpson never cited this provision before the Vermont Court. In any event, § 102(b)(6) applies only to "*storage* for regulation of

Second, Simpson argues that "[s]tate aesthetic or recreational conditions unrelated to water quality could frustrate FERC's role as the exclusive forum for comprehensive licensing of hydroelectric uses of navigable waterways." Pet. 25. But as respondents have shown above, the 210 cfs condition *is* related to water quality.

Finally, noting that Vermont and New Hampshire reached different conclusions concerning the necessity of a spillage condition,[19] Simpson also argues that "[i]n the FPA, Congress vested exclusive licensing authority in a single federal agency in order to avoid such inconsistencies." Pet. 26. This is a non-sequitur. Application of § 401(a)(1) in the boundary waters situation *always* raises the possibility that one state will be stricter than another. This possibility is just as real when both states base their certifications on purely quantitative water quality standards (which Simpson concedes they may do) as when one of them applies a non-quantitative standard. In either

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streamflow." (Emphasis added.) The challenged condition of the DEC certificate requires *spillage*, not storage.

[19] Simpson's characterization suffers from several inaccuracies. First, Vermont's spill condition is not "directly contrary to New Hampshire's § 401 certification that the project is in full compliance with that state's water quality standards." Pet. 25. The Vermont condition was based on *Vermont's* standards, and therefore is in no way contrary to New Hampshire's conclusion that its own standards were met.

Moreover, Simpson's assertion that the Gilman Dam is located entirely in New Hampshire waters (Pet. 26) ignores two other key facts: the "discharge" that gives rise to § 401(a)(1) jurisdiction occurs in Vermont (*see* p. 13, *supra*), and the waters above and below the dam are partly in Vermont. *Vermont v. New Hampshire*, 289 U.S. 593 (1933).

case, the result is clearly dictated by §§ 401(a)(1) and 510: the stricter condition controls. *See Arnold*, 717 P.2d at 1278 n.4 (court distinguishes *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), stating: "In the CWA, Congress has created an independent state role in all federal actions involving discharges into navigable waters; the question is not Congressional preemption but what criteria Congress intended the states to consider in deciding whether to issue certificates of compliance with the act.").

## V. CONCLUSION

Simpson's petition for a writ of certiorari should be denied.

Dated: February 16, 1993

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SUPREME COURT

OF THE

STATE OF VERMONT

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No. 91-530

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GEORGIA-PACIFIC CORPORATION
and SIMPSON PAPER (VERMONT) CO., INC.,
Plaintiffs/Appellants

v.

DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and SIERRA CLUB,
Defendants/Appellees

---

On Appeal From The Washington Superior Court
No. S473-89 WnC

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# APPELLANTS' BRIEF

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## SUMMARY DESCRIPTION OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the Department of Environmental Conservation's ("DEC") issuance of a "Section 401 Certification" for a dam and hydro-electric facility owned and operated by Plaintiffs/Appellants on the Connecticut River at Gilman, Vermont. *See* Printed Case (hereafter "PC") at 8-23. This facility provides electric power for the use of the adjacent paper mill owned and operated by Simpson Paper (Vermont) Co. ("Simpson").[1] The 401 Certification is required by federal law in connection with Simpson's relicensing proceedings for the Gilman dam facility, which are still pending before the Federal Energy regulatory Commission ("FERC"). A 401 Certification must be obtained from any state agency having jurisdiction over a discharge into waters of that state, certifying that applicable state water quality standards will not be violated by the facility.[2] A FERC license incorporating the final 401 Certification is expected to be issued for a minimum term of 40 years.

The only item still in dispute is the condition imposed by DEC in the 401 Certification, requiring that

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[1] Georgia-Pacific Corp. formerly owned the entire mill complex. It has also contracted to sell the hydro-electric facility and dam to Simpson, but the transfer has not yet been formally approved by FERC. G-P remains a nominal party only in this appeal, and hereafter Appellants will be referred to as Simpson, including actions taken by G-P prior to the mill's sale.

[2] *See* §401(a) of the Clean Water Act ("CWA"), 33 U.S.C. §1341(a). Pertinent excerpts from the Vermont Water Quality Standards ("WQS") which were in effect at the time, are included at PC 81-89.

Simpson continuously spill over the dam, instead of allow to pass through the turbines and generate electricity, 210 cubic feet per second ("cfs") of river water from June 1 to October 15 of every year. PC 20. This condition would be effective without regard to actual river flows or water quality levels at any given time. Simpson proposed but DEC rejected a management plan in place of the continuous spillage condition, which would require Simpson to spill stipulated flows over the dam whenever necessary to correct any actual or anticipated water quality violations.

Simpson simultaneously appealed the 401 Certification to the Vermont Water Resources Board, and to the Washington Superior Court under Rule 75, V.R.Civ.P. DEC contested the Board's statutory jurisdiction to hear that appeal; the Board ruled that it did have appellate jurisdiction. DEC appealed that determination to the Washington Superior Court, which reversed and held that the Board did not have jurisdiction over appeals from DEC's issuance of 401 Certifications. That judgment was not appealed. During 1991 the Legislature passed an amendment to the applicable statute which made it clear that the Board did have *de novo* appellate jurisdiction in such instances.[3] Simpson is the only 401 Certification applicant in Vermont who ever has been or will be denied *de novo* appellate review before the Board.

Simpson then pursued this action, which was the alternative appeal under Rule 75. It first moved for a remand to DEC for additional consideration and to take

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[3] *See* 10 V.S.A. §1024(a) (as amended 1991 Leg. session).

additional evidence, and/or reconsideration of the trial court's informal ruling that the case would be decided only on the administrative "record" and would not be heard *de novo* by the court. The trial court denied that motion on May 2, 1991, without written opinion or explanation. The parties then briefed and orally argued the merits – principally, Simpson's contention that the continuous spillage requirement was arbitrary and capricious and not supported by substantial evidence – based only on the administrative "record". On October 2, 1991, the court issued a written Opinion and Order, with findings and conclusions, sustaining DEC's 401 Certification in all respects, particularly the continuous spillage condition. *See* PC 24-37. On October 21, 1991, Simpson filed a Motion to Amend and/or Make Additional Findings, which was denied by the court, again without written opinion or explanation, on December 16, 1991. Simpson filed its Notice of Appeal on November 1, 1991. PC1.

## STATEMENT OF THE ISSUES

1. Was a remand of the 401 Certification to DEC to take additional evidence and/or for reconsideration, or alternatively a *de novo* hearing on the merits in the Washington Superior Court, required under established Vermont law, recognized principles of administrative law, and/or Rule 75, V.R.Civ.P.?

2. Was a remand of the 401 Certification to DEC for additional evidence and/or reconsideration, or alternatively a *de novo* hearing in Superior Court, required to prevent violations of the 5th ("Due Process" clause) and 14th ("Equal Protection" clause) Amendments to the

United States Constitution, and the Vermont Constitution, Chap. I, Arts 4, 7 and 9 which have occurred in the absence of such further proceedings?

3. If a remand to DEC for additional evidence and/or further consideration was not required as a matter of law for the reasons contended in Questions 1 and 2 above, did the court below nonetheless abuse its discretion in not ordering such a remand given all of the facts and circumstances of the case?

4. Is paragraph 2 of Condition A of the 401 Certification (the 210 cfs continuous spillage requirement from June 1 to October 15 each year) unsupported by substantial evidence in the administrative record?

5. Is paragraph 2 of Condition A of the 401 Certification (the continuous spillage requirement) arbitrary and capricious?

6. If paragraph 2 of Condition A of the 401 Certification cannot be sustained as a necessary water quality restriction, was it beyond DEC's and the trial court's authority under applicable federal law to base such a spillage requirement alternatively on generalized, nonspecific considerations of "aesthetics" and/or "recreation"?

7. Were the trial court's findings of fact and/or conclusions of law, sustaining the 401 Certification in all respects, clearly erroneous?

## STATEMENT OF FACTS

The Gilman dam and impoundment on the upper Connecticut River was originally constructed in 1900, and

has been operated since then as a "run of river" project which essentially passes on an instantaneous basis the same volume of water which flows into it. It has been licensed as a hydro-electric facility since 1965, retroactively to January 1, 1941. Electricity generated is used to power the adjacent specialty paper mill now owned by Simpson; that plant produces approximately 70,000 tons of paper each year and employs approximately 180 people in the "upper valley" region of Vermont and New Hampshire. River flows between 130 and 2,850 cfs are routed through the hydro-electric facility; flows under or over those limits are in fact spilled over the dam or through its crestgate. The State of New Hampshire has already issued its Section 401 certificate for the facility which allows Simpson to continue operation of the dam without any spillage requirement, having found that "run of river" operation does not violate any New Hampshire water quality standards.[4]

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[4] The Connecticut River is, of course, located within New Hampshire up to the low-water mark on the Vermont side. *See Vermont v. New Hampshire*, 289 U.S. 593 (1933). The entire dam is itself located in New Hampshire as is the "crestgate" through which spillage mandated by Vermont will pass. The "powerhouse" is partially in Vermont and partially in New Hampshire. The New Hampshire Class B standard for DO is actually higher, or *more stringent*, than the Vermont water quality standard then in effect, requiring 75 percent saturation, whereas the Vermont standard requires only 6 mg/l of DO or 70 percent saturation. PC 88; *cf.* Record on Appeal (hereafter "RA"), State's Exh. I. At 22°C (71.6°F), the critical water temperature used in the computer modeling relied on by DEC, 75 percent DO saturation would be 6.56 mg/l.

Upstream of the Gilman dam are numerous "point sources" of pollution, both municipal and commercial, which operate pursuant to their own state/federal wastewater discharge permits, but which still contribute pollution loading to the river as it enters the Gilman impoundment; included among these is the discharge from the Simpson paper plant itself.[5] There is also pollution from indirect sources such as agricultural runoff and residential wastewater disposal. However, during these Section 401 proceedings DEC agreed that it would assume that all Vermont water quality standards are met above the dam. The most critical of these technical requirements for purposes of this appeal is the level of dissolved oxygen (hereafter "DO"); DO is used up not only by fish and other "aquatic biota" in the river, but also by other identifiable pollutants, such as "biochemical oxygen demand" or "BOD." The Vermont DO standard in the river segment at issue is 6 mg/l or 70% saturation, PC 88; at 22°C, which is the average high river temperature during the summer, the stipulated minimum DO standard is 6.2 mg/l.

River flows exiting the facility's tailrace, as well as those at the foot of the dam whenever there is spillage, were actually measured both before and after the Certification was issued, and have consistently been in excess of 6.2 mg/l DO. There is also a measurable increase in DO levels in the river for the first mile below the dam

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[5] The plant received a five-year renewal of its "NPDES" discharge permit from DEC as of March 15, 1989, only 5 months before the 401 Certification was issued.

during summer months, when that segment is free-flowing, despite the fact that just below the dam Gilman's municipal wastewater – which is treated and subject to its own direct discharge permit – enters the river. At about one mile below the dam the river enters what under typical summer conditions is the uppermost limit of the Moore Reservoir.[6] PC10, ¶6. The river becomes more sedentary and begins to deepen; the Moore Reservoir, which feeds the Moore hydroelectric facility operated by New England Power, is one of, if not the largest impoundment on the river.[7] It is well beyond that point, some 2.4 miles downstream, that computer modeling predicts a slight "sag" or decrease in DO levels during potentially extreme summertime conditions.[8]

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[6] During winter months, the head of the Moore Reservoir ordinarily comes almost to the foot of the Gilman dam. However, it is agreed that a DO violation is unlikely then, despite the absence of a free-flowing downstream river segment, because flows are higher and water temperatures are lower.

[7] Moore Reservoir is approximately 11 miles long, 0.6 miles wide and 30 to 150 feet deep; at "full pool" it has a surface area of 3,490 acres and a reservoir volume of 88.7 billion cubic feet of water. *See* RA, Metcalf & Eddy 1983 Report, at B-3-2. In contrast, the Gilman dam impoundment is approximately 2.9 miles long, 375 feet wide, and 19 to 26 feet deep; it has a gross storage volume of 705 acre/feet, or 30.1 million cubic feet of water, but "negligible" usable storage capacity because the dam is operated as a "run of river" facility. *See* RA, State's Exh. F at A-4. Moore Reservoir is approximately 3,000 times the size of the Gilman impoundment, over five (5) times as deep, and unlike Gilman, actually stores water rather than releasing it "instantaneously."

[8] Because of all the complexities involved, most analysis of water quality is done through computer simulations, although actual sampling – such as that conducted for G-P and Simpson in 1985, 1990 and 1991, respectively – is obviously preferable.

This computer prediction of a small DO "sag" downstream of the Gilman dam is dependent on the simultaneous concurrence of at least four independent variables: maximum wastewater discharges from both the much larger James river paper plant in Groveton, New Hampshire (which eventually enters the Connecticut river upstream of the Gilman impoundment), and the Simpson paper plant itself; low river flows at a level called "7Q10" (the lowest average volume of water which historically one can expect once every ten years over a period of seven days), which was calculated to be 373 cfs: and critically high summertime water temperatures. In addition to the necessary convergence of those four primary factors, DEC staff also hypothesized a negative effect from diurnal "flux caused by algal respiration and photosynthesis." PC 15.[9] Finally, DEC included in its

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[9] The theory of diurnal fluctuation due to stratification and algal activity in Moore Reservoir was emphasized by DEC staff late in the permit application and analysis process, as another justification for DEC to increase its proposed spillage requirement from 185 cfs to 210 cfs. This additional or alternative justification for substantial spillage became necessary because (a) the refined computer model was demonstrating no DO violation of even "sag" in the first 2-plus miles below the dam, and at worst only a smaller decrease in DO of 0.4 mg/l in Moore Reservoir, and (b) DEC staff realized its error in assuming until then that the Gilman mill's discharge entered below the dam. It is evident from the "record" that until June 1989, DEC staff had intended to use spillage over the dam as additional "compensation" for the pollutant loading which they erroneously thought Simpson was adding below the dam. *See* PC 58, 60. That fundamental error was apparently why DEC was originally willing to agree that all WQS standards were met above the dam (where the mill discharge actually enters); by June 1989 it was too late for DEC to retreat from that agreement, so it scrambled to come up with another justification for substantial spillage.

analysis the effect of substandard DO levels **upstream** of and passing through the dam, despite its agreement to assume that DO levels above the dam were in compliance. PC 13-14, 15. By melding together these various elements, DEC staff devised a theoretical "DO violation" of 1.2 mg/l which Simpson would be required to "correct" through continuous spillage over 4½ months. PC 15, 20.

Because it is so demonstrably unlikely that all the necessary variables would converge so as to create an actual downstream DO sag as hypothesized by the computer modeling, Simpson initially proposed instead a "Water Quality Management Program" which would continuously evaluate river conditions from July 15 through September 15 of each year, and automatically spill sufficient water over the dam to prevent any predicted or likely violation of DO standards below the dam. PC 14, 43-44, 47-52, 65-66. DEC staff repeatedly informed Simpson that they were not interested in any such management techniques and would insist instead on a simple, continuous spill requirement. Simpson continued to offer to revise and expand the plan to meet specific technical concerns, but was met only with DEC's "historic resistance" to all such proposals. PC 48. Simpson nonetheless formally prepared a final revised management plan for submission to FERC; it was also provided to DEC in August 1989, just after DEC had issued the Section 401 Certification because of a one-year processing deadline.

Although G-P's formal August 1989 submission is not part of DEC's formal "record,"[10] Simpson's proposal for such a plan was clearly and continuously discussed with and rejected by DEC. Also not included in the administrative "record" are (1) a January 1990 "Report on Additional Water Quality Modeling Study" which was submitted to refine the June 1989 computer modeling analysis by (a) determining a more modern and accurate 7Q10 flow volume, at 400 cfs rather than 373 cfs, and (b) dividing the relevant portion of the River into five primary study "reaches," both above and below the dam; (2) a December 1990 Water Quality Monitoring Study, which updated and verified the actual sampling data last taken in 1985, between August 15 and September 19, 1990,[11] and (3) a November 1991 letter with "Results of Summer 1991 Water Quality Monitoring" conducted over 48 hours from July 22 to July 24, 1991.[12] PC 77-78. This last effort to

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[10] The State ostensibly contends that "the record" should include no materials or information after July 28, 1989, but has no compunction against relying on such materials when that suits its purpose. *See* text *infra*, at 32-33. In any event the administrative "record" when the agency proceedings are informal, as here, cannot be so rigidly controlled. *See* Point I(A), *infra* at 18-19.

[11] Average flow volume during the period was 1,892 cfs, well in excess of the critical 7Q10 flow of 373 cfs. At the point 2.4 miles downstream in Moore Reservoir where the computer-predicted DO "sag" might occur, the lowest actual DO measurement was 7.8 mg/l (90.9 percent saturation) at a temperature of 21,86°C.

[12] This sampling occurred when river flows ranged between 500 and 550 cfs, conditions near the crucial 7Q10 flow of 373 cfs. At the critical Moore Reservoir sampling point, at temperatures exceeding 25°C (22°C was the input parameter in

obtain actual DO sampling data at river conditions approaching (and even exceeding) the critical parameters used in the 1989 computer projections, could not have occurred any sooner than July 1991 because the necessary "low flow" conditions were simply never experienced throughout the permitting process until July 1991.

## SPECIFIC FACTUAL DETERMINATIONS

While the foregoing Statement of Facts provides an overview of this appeal sufficient for the Court's review of Issues 1-3, there are some additional and detailed facts which are necessary for consideration of Issues 4-7 relating to the merits of the 401 Certification and whether its key findings and conclusions are supported by substantial evidence and not arbitrary or capricious.[13]

### (A) The 1989 Computer Modeling

There is no dispute that in June 1989, late in the one-year review process allowed for 401 Certifications, Simpson and DEC finally agreed on a computer model to stimulate DO conditions below the Gilman dam. It is this theoretical modeling analysis that is the linchpin of DEC's continual spillage requirement, and while there is

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the 1989 computer projection), DO was never less than 7.55 mg/l, well above the Vermont DO standard.

[13] As below, by proceeding to this next level of "on the record" analysis, Simpson in no way intends to waive its arguments that this type of review in this particular case was and is inappropriate and a denial of Simpson's substantive and procedural rights.

no real disagreement on what it shows, there is strong argument on what it means.

The final revised "DOSIM" model runs prepared for Simpson, with input variables apparently agreeable to DEC,[14] showed that (a) under possible 7Q10 (i.e., 373 cfs) river flow conditions, (b) at summertime river temperatures of 22°C (71.6°F), and (c) with *all* upstream point source discharges at maximum permitted levels, downstream of the Gilman dam there could theoretically be a "sag" or temporary decline in DO levels from 6.3 mg/l to 6.1 mg.; before recovering to 6.4 mg/l, at distances below the dam of 1.5 to 2.4 to 3.5 miles respectively. PC 69-76. In other words, if *all* of those conditions occurred simultaneously, the refined "DOSIM" model predicted that for a stretch of approximately 0.4 of a mile – at a location more than two miles downstream of the dam – there could be a *de minimis* violation of Vermont water quality

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[14] Simpson's engineering consultants considered DEC's "DOSIM" computer program to be more simplistic and less reliable than another, newer program available. However, because DEC could only run "DOSIM" and was insistent on its use, Simpson relented. Apart from DEC's mistaken assumption about location of the Simpson mill's direct discharge, *see* fn. 9, *supra*, the consultants also refined the "DOSIM" model in June 1989 in several other significant ways: the assumed river temperature was changed to 22°C, the number of study reaches below the Gilman dam was increased from one to three, the river velocities in each of those stretches was adjusted, and certain pollutant decay rates were changed to more accurately reflect "standard engineering practices." *See* RA, July 1989 KA Study, at 7-11.

DO standards (0.1 mg/l if the standard is 6.2 mg/l).[15] *Id.* This potential "sag" in DO levels downstream of the Gilman dam was acknowledged to be no more than 0.4 mg/l of DO before recovery, PC 67, and any part of this theoretical DO "sag" which does occur would be well within the summertime limits of the downstream Moore Reservoir.[16]

There is no predicted violation of the DO standard, or even "sag" in existing DO levels, at any point in the 1.5 mile "riverine" and "transitional" sections of the River below the dam, under all adverse conditions as premised above, and in fact there is a predicted increase in DO of 0.1 mg/l. PC 76. Admitting for the moment that this computer prediction is an accurate prediction of what would actually happen in the river under stipulated critical conditions – a colossally incorrect assumption, as later *sampling* data has shown, *see* Point III *infra*, at 30-31 – still one searches in vain throughout "the record," the 401

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[15] Actually, the DO standard at 22°C would be 6.12 mg/l, but because the "DOSIM" model is less accurate, and to be conservative, Simpson agreed that the standard could be rounded off to 6.2 mg/l. *See* RA, July 1989 KA Study, pg. 7, ¶4.

[16] As finally run, the "DOSIM" model (*see* PC 76) had three study reaches below the Gilman dam: The first 1.0 mile, which would be "riverine" in nature and allow for some natural reaeration over shallow rapids and/or riffles; a "transitional" reach of 0.5 mile at the presumed entrance to Moore Reservoir; and the final 2.0 miles which are well within Moore Reservoir both in vertical profile and hydraulically. *See* RA, State's Exh. 1, fig. 1. "Run E" (PC 76) must be read in reverse; mile 3.4 under "Distance" is the base of the dam, while mile 0.0 is 3.5 miles downstream in Moore Reservoir. The hypothetical "sag" would be at miles 1.3-1.1.

Certification itself, or even the trial court's findings, for any remotely rational or scientific explanation and analysis of how this DO "sag" is in Moore Reservoir actually *caused* by lack of spillage at the Gilman dam, rather than the effect of Moore Reservoir on pollutants added upstream and downstream of the dam.

(B) Frequency Of Necessary High Temperatures

The seven-day average summer high water temperature in the Connecticut River at the project site, which was assumed for all the computer modeling runs in June 1989, is 22°C (71.5°F), based on daily temperature readings from January 1979 to April 1989 (except June 1984 to August 10, 1985). Seven-day average river temperatures in excess of 21.1°C (70°F) have typically occurred for approximately a four-week period, from July 10 to August 6 of each year. Seven-day average river temperatures exceeded 65°F for approximately a seven-week period, from July 7 to August 27 of each year. The highest absolute temperature recorded during the period was 26.4°C (79.5°F), from July 30 to August 3, the highest seven-day average river temperature was 21.9°C (71.4°F) for July 10 to July 17. *See* RA, July 1989 KA Report, at 2 and Fig. 1. No violation of Vermont's DO water quality standard is likely to occur when river temperatures are 65°F or lower. *Id.*

It is thus beyond any argument that even "the record" before DEC showed that, at worst, the high river temperatures necessary, by definition, to trigger the modeled computer result could only occur during a seven to eight week period in July and August. Notwithstanding,

DEC imposed a continuous spillage requirement from June 1 to October 15, 4½ months of every year.

(C) Frequency Of Necessary Low River Flows

River flows of approximately 375 cfs (the 7Q10 flow was assumed to be 370 cfs for the "DOSIM" model runs; New Hampshire had actually calculated 7Q10 to be 373 cfs) are exceeded approximately 96-97% of the time over the entire period of record (1941-1982) at the nearest USGS gauge. *See* RA, State's Exh. F, at A-3 and Fig. A-1. In other words, the flow conditions needed to produce the model result will statistically occur only 3-4% of the time. Put differently, no violation of the Vermont DO water quality standard is likely to occur, even downstream in Moore Reservoir, at flows equal to or exceeding 800 cfs,[17] PC 12-13, but during the months of July, August and September – which encompass the period of highest river temperatures – flows of 800 cfs are exceeded 80%,

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[17] At flows of 800 cfs, there is also no actual measured DO violation in the impoundment *behind* the Gilman dam. At measurement Station 4, just above the dam crest, the lowest measured DO level, at a depth of 25 feet, was 6.25 mg/l at 70.7°F. *See* RA, Aquatec Date Report (August 12, 1985, 8:45 p.m.). The DO level at Station 4 at depths down to ten feet ranged from 6.3 mg/l (August 12, 1985, 8:45 p.m.) to 8.6 mg/l at one-half foot (August 12, 1985, 8:45 p.m.; August 13, 1985, 8:20 p.m.). The 1991 sampling data, *see* PC 77-78, confirmed there are no DO violations in the Gilman impoundment even at lower flows of 500-550 cfs. This calls into question DEC's essential premise – *see* PC 59-61 – that DO conditions behind the Gilman dam are actually substandard (even though it purported to agree DO standards were met behind the dam).

70% and 70% of the time respectively. *Id.*, Exh. I, at 4 and Fig. 4-6.

Based on "the record" evidence alone – once the focus is limited to July and August when high enough water temperatures might occur – it is again beyond any genuine dispute that low flow conditions below the State's admitted safety threshold (800 cfs) are likely to occur at worst 30% of the time. Over a 62 day period, that results in an admittedly mathematical average of 18.6 days in which the modelled result *might* occur.[18] While Simpson understands the need to be more conservative than the mathematical average, that hardly justifies an exponential increase to 138 days of continuous spillage regardless of actual river conditions.

(D) Simpson Constantly Attempted to Engage DEC In Substantive Analysis Of A Workable Alternative To Continuous Spillage

Since late 1986, when required informal discussion began for this certification process with DEC, Simpson has proposed some form of water quality monitoring and intermittent dam spillage to ameliorate any downstream DO violations which might occur under modeled conditions – even though those effects, if any, occur well into Moore Reservoir and there is no scientific proof they are actually caused by the Gilman dam's traditional "run of river" operation. *See* PC 14, 43-44, 47-52, 65-66. Simpson

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[18] Of course, it is arguable that the real incidence is only 3-4% of 62 days, or a potential 2.5 days, since that is the statistical occurrence, on this record, of 7Q10 low flows.

was well aware from the outset that DEC had already determined to impose a spillage requirement to aid in general re-aeration of the river, if it could come up with any arguable basis to do so.[19] *See* PC 40, and Point IV(A), *infra* at 38-41. Thus by January 1987 Simpson had proposed to spill 100 cfs of water over the dame at any time between July 15 and September 15 that (a) flows were 500 cfs or less, and (b) background DO levels were 6.2 mg/1 or less. PC 50-52.

DEC's response was curt: "Tom [Willard] indicated that the Department has historically resisted management of the resource on such a frequent basis." PC 48. In fact, almost all direct discharge (i.e., wastewater treatment) permits have conditions requiring daily measurement and monthly reporting of various water pollutants; the required technology is-well-established and familiar to DEC. Essentially the same proposal was still on the table in April 1987. Simpson's monitoring/spillage proposal was reiterated in substance in May 1989; at that time the proposal was not limited to any particular combination of background flows, spillage (although the proposed quantity was in fact increased to 130 cfs) or DO levels, but simply whatever "spillage may be necessary to maintain water quality standards for dissolved oxygen." That generic proposal was repeated again on July 24, 1989. *See* RA, State's Exh. L. DEC never abandoned its "historic resistance" to any management and monitoring plan

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[19] The "record" totally refutes the trial court's conclusion that Simpson did not propose an alternative management plan until it "realized that DEC was serious" in June 1989 about imposing continuous spillage.

regardless of the specific details of the proposal. Simpson never made the "formal" or "specific" proposal that DEC and the trial court concluded should have been offered, because the specific details were wholly irrelevant to DEC inasmuch as it unilaterally rejected the entire concept.[20]

## ARGUMENT

### I. UNDER VERMONT LAW AND PRACTICE THIS APPEAL SHOULD HAVE BEEN REMANDED OR ACCORDED DE NOVO REVIEW

#### (A) De Novo Review Is Provided By Law And Prior Practice

Rule 75, V.R.Civ.P., under which this action was brought, does not itself provide for the type of standard of review in a particular case; that determination is to be made in light of all the circumstances in a given action. The original Reporter's Notes state: "Rule 75(d) leaves to specific statute or prior practice the questions whether review in a given case is de novo. . . . " Since there is no "specific statute" applicable here – in fact it was the Legislature's failure to provide for a specific route of appeal from issuance of a Section 401 Certification,

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[20] DEC's final memo on the Certification prior to issuance noted concerns abut enforceability of any management plan made a condition to a 401 Certification. PC90. Putting aside the utter cynicism of such a stance, that logic would apply as well to the spillage condition it *did* impose. This concern was and clearly is make-weight.

thereby requiring resort to Rule 75, that creates the primary procedural dilemma here – one must look to "prior practice."

One element of relevant prior practice is that until the State raised its jurisdictional objections in the companion case, all appeals of 401 Certifications were heard *de novo* by the Water Resources Board. Equally telling is that every other water quality permit or license issued by DEC was then and still is subject to *de novo* review by the Board. *See* 10 V.S.A. §§1024, 1099 and 1269. Inasmuch as issuance of a Section 401 Certification must be limited to water quality issues,[21] *see Arkansas v. Oklahoma,* 60 U.S.L.W. 4176, 4181 (Nos. 90-1262, 1266) (Feb. 26, 1992) and Point V, *infra* at 46-49, relevant Vermont practice indicates that *de novo* review is not only appropriate but necessary.

*Chapin Hill Estates, Inc. v. Town of Stowe,* 131 Vt. 10 (1972), supports a *de novo* appeal in this instance. In *Chapin Hill* the taxpayer had no specific statutory route of appeal from a town's decision denying a request to abate property taxes, so this Court held that a Rule 75 action was appropriate. The Court also stated that the town's decision was reviewable "in the nature of *certiorari," id.* at 13, even though it is unlikely that the town's determination was made on anything close to a quasi-judicial basis. Finally, because the "record" before the trial court was

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[21] DEC's own regulations provide from processing of 401 Certifications as if they were applications for a discharge permit under Chapter 47 of Title 10. *See* Vermont Water Pollution Control Regulations, Rule 13.11, 5 *Code of Vermont Rules,* pg. 12033002.

inadequate and lacked at least one essential fact, the Court held that "review in the nature of *certiorari* may not be limited only to the facts as found in the record. Furthermore, the reviewing court is not precluded from taking testimony." *Id. See also Pyles v. Schmidt,* 141 Vt. 419 (1982) (trial court apparently took evidence and made findings in Rule 75 appeal).

The decision in *Chapin Hill* has never been overturned or critically distinguished in the ensuing 20 years. Nonetheless, more recent decisions speak of cases under Rule 75 as actions "which are in the nature of certiorari and which do not contemplate de novo review . . . [but are] confined to addressing substantial questions of law affecting the merits of the case." *Molesworth v. University of Vermont,* 147 Vt. 4, 6-7 (1986). *Chapin Hill* is not discussed or even cited in *Molesworth,* and there is no mention in the latter case whether there was any deficiency in the "record" or any disputed questions of fact. The legislature had clearly delegated tuition residency decisions to the University, and there was no similar practice – unlike here where *de novo* appeal was before and is now available of all other water quality permits, including 401 Certifications – which would compel a different procedure. Finally, the plaintiff in *Molesworth* did have an intermediate right to present evidence and develop an adequate record at that stage.[22]

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[22] *Vincent v. Vermont State Retirement Board,* 148 Vt. 531 (1987), appears to be uninstructive. There was no material disagreement as to any of the facts; the essential dispute was a question of law only. In any event the Retirement Board is given the authority to create administrative rules pursuant to 3 V.S.A. §801 et. seq., which provide for "contested case" procedures

Moreover, any rational view of orderly administrative procedures must hold that the failure to provide Simpson a "contested case" type proceeding before DEC,[23] removes any justification for subsequent appellate review solely "on the record" and under a "substantial evidence/arbitrary and capricious" standard. Professor Koch in his treatise states that this traditional rule of deference to administrative proceedings typically "exists when the [agency] decision was made through a formal, trial-like proceeding." 1 Koch, *Administrative Law & Practice*, 9.4, at 92 (1985 ed.) (fn. omitted). He continues: "the substantial evidence standard [applies] where an administrative decision must be made through trial-type procedures . . . , i.e., formal adjudication." *Id.*

However, when informal adjudication procedures are followed by the agency, as here, "the record may not be sufficient for judicial review" and in these limited circumstances the court may take additional evidence to test the agency's findings and conclusions.[24] *Id.*, §8.23, at 30 (1990

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and thus provide benefit applicants with a fair opportunity to present evidence and develop a formal record for later review.

[23] Appellants are and were clearly entitled to a formal hearing on their application. *See* 3 V.S.A. §814 (a) and Point II (A), *infra* at 22-25. However, Simpson was caught in the catch 22 of believing that it would get its opportunity for a "contested case," if one became necessary, at the Water Resources Board – just like every other 401 applicant before and after. Thus there was no need to raise that complaint at the DEC level. Once relegated to Rule 75 review, Simpson has made this claim at every opportunity.

[24] "Under [de novo] review the administrative record becomes an object of attack along with the relevant final decision. The challenger, like any other plaintiff, must show by a

Supp.) (cits omitted); §9.3 (1985 ed. & 1990 Supp.). The trial court should have done so here, not only because of the highly probative additional evidence that has become available, *see* PC 77-78, and because DEC arbitrarily refused to consider a management plan alternative to continuous spillage, but also because the "record" is simply too informal and too amorphous to support any reasoned and objective review of the agency's final decision.

Past and present practice with regard to appeals of Section 401 certificates; the established practice of *de novo* review of all other water quality permits; any principled view of fair and orderly administrative procedure; and the demonstrated deficiencies in the informal "record," all argue in favor of *de novo* review in this instance. Simpson should be provided the opportunity – which it has never had – to demonstrate at a "fair hearing" with all available evidence, that its proposed method of operation of the dam (including Simpson's proposed summertime water quality management program) entitles it to an unrestricted 401 Certification. At such a hearing Simpson would bear the ultimate burdens of proof and persuasion that continued "run of river" operation (as modified) of the Gilman facility, does not and will not result in any degradation of existing water quality or violate any water quality standards. The trial court's order should be reversed and the case remanded for that purpose.

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preponderance of the evidence in the judicial record that the agency decision is wrong. In doing so, the challenger may introduce into the judicial record other evidence or request new or different inferences from the administrative record." *Id.* §9.3, at 88 (1985 ed.) (fn. omitted).

(B) Alternatively, The Trial Should Have Remanded This Case To The Agency For Further Proceedings[25] Under Existing Rule 75 Practice

*Burroughs v. West Windson Board of School Directors*, 141 Vt. 234, 237 (1982), establishes that even though a court under Rule 75 may have "jurisdiction in the nature of an appellate court only," *id.*, if in the case there are "factual issues requiring a hearing" then the court must remand the case to the originating governmental entity to hold such a hearing or at least resolve the factual disputes. *Id.*[26] Simpson has identified several substantial areas where there is a dispute over material facts: Is the theoretical DO "sag" problem in Moore Reservoir actually caused by the Gilman dam and hydro-electric works? Has the State in fact acted on the erroneous assumption that the Gilman paper plant's wastewater discharge enters the river below rather than above the dam? *See* PC 13-14, 15. Did DEC in its actual analysis renege on its agreement to assume that all water quality standards were met at the dam, and base its continuous spill condition at least in part on a contrary finding? *Id.* Does the

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[25] The scope of those further proceedings has changed during the time this case was pending below. In Simpson's view, the 1991 changes to 10 V.S.A. §1024 (a), providing that any action of the agency with respect to 401 Certifications is appealable *de novo* to the Board, makes it no longer necessary to hold a "contested case" hearing before DEC because the proper remedy is now provided by the statutory right of appeal.

[26] *See also In Re Classification of Airport & Pond Brooks*, 142 Vt. 458 (1983) (remand for correction of signature errors); *In Re Williams Point Yacht Club*, Docket No. S213-89 CnC (April 18, 1990) (remand for reconsideration of public trust issues).

additional water sampling data obtained in 1990 and 1991 support the computer model's theoretical DO "sag" prediction? What exactly are the necessary "details" of the water quality management program which Simpson proposed as an alternative to continuous spillage for 4½ months, which DEC has asserted were lacking? None of these questions can even be addressed, let alone resolved on any objective basis, on the administrative "record" presently offered by the State.

Remand of this case to DEC for further consideration of these issues and supplementation of the record, will serve the ends of justice by assuring that the matter can be determined on all the best evidence available. These proceedings may well be Simpson's only opportunity to adjudicate substantially restrictive permit conditions which will be imposed in connection with a FERC license lasting at least 40 years. Moreover, the evidence excluded from the informal administrative "record" indicates that there is no reasonable likelihood of water quality degradation from "run of river" operation even without continuous summertime spillage, and thus there is no real danger of prejudice if such a remand is granted.

## II. DE NOVO REVIEW OR REMAND SHOULD HAVE BEEN PROVIDED TO REMEDY CONSTITUTIONAL DEFECTS

### (A) Due Process

Simpson has a substantial property right in the present mode of operation of the dam and hydro-electric works as a "run of river" facility without imposition of a summertime (actually 4½ months) continuous spill

requirement. It has been operated as such for the past 50 years, and Simpson has invested significant funds in the facility. But for the intervention of Section 401 and its requirement that a state water quality certificate be obtained, Simpson would have the right, as a riparian user under common law, to continue the present operation of the dam subject only to FERC relicensing. *Cf. Gour v. Morse,* 652 F.Supp. 1166 (D.Vt. 1987) (day care operator's fundamental property right in continued operation).[27]

Moreover, imposition of the State's continuous spill condition increases significantly the cost of operation for the adjacent paper mill, which must then purchase commercial power to replace the hydro-electric power unnecessarily lost because of the arbitrary spillage requirement. The re-issued FERC license now sought will last at least 40 years, hence it is imperative that the 401 Certification, which imposes conditions more restrictive than necessary

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[27] *See also Burroughs v. West Windsor Board of School Directors,* 138 Vt. 575, 578 (1980). The existence of a protected property right in flexible and may depend on established relationships, prior practice and existing understandings. State law determines whether a property or other fundamental right exists, while federal law provides the procedural protections which must be made available under the due process clause of the 14th Amendment to the U.S. Constitution. *See Robinson v. Via,* 821 F.2d 913 (2d Cir. 1987). Other property or fundamental rights which have been recognized include electric service. *Condosta v. Vermont Electric Cooperative, Inc.,* 400 F.Supp. 358, 365 (D.Vt. 1975); parental custody, *Paquette v. Paquette,* 146 Vt. 83 (1985); and entitlement to educational credits or degrees already earned, *Merrow v. Goldberg,* 672 F.Supp. 766 (1986), 674 F.Supp. 1130 (D.Vt. 1987).

to protect water quality, be given the closest scrutiny. Vermont law is clear that, at some stage, Simpson should have been and must be provided with a trial-type, formal adjudicative hearing which would include at the very least "an effective opportunity to defend by confronting any adverse witnesses" or evidence, and to rebut any other information relied on by the agency,[28] a complete and formal record of the proceedings adequate for subsequent review or appeal; an impartial decision-maker,[29] and a clearly-stated effective right to further administrative and/or judicial review. 1 Koch, *Administrative Law & Practice*, §7.23, at 575-76 (fns. omitted). Simpson has enjoyed none of those basic procedural safeguards. *See* 3 V.S.A. §809; *Appeal of Stratton Corp.*, ___ Vt. ___, 2 Vt. Law Week 411, 412-413 (No. 90-278, 10/11/91) ("an adjudication based on the particular facts concerning specific

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[28] Only after-the-fact, in preparing for the case below and reviewing the materials designated by the State as "the record," did Simpson discover that DEC had obtained and apparently relied on a mass of Connecticut River data unilaterally retrieved from an EPA "Storet" computer. *See* RA, Cueto Aff., ¶4 (3/18/91). Simpson never received any notice of this data retrieval or any notice of what use DEC intended to make of it, and thus no opportunity at all to rebut it or any inferences drawn by DEC staff. This episode is simply illustrative of the procedural infirmities which infected this informal permitting process, in violation of Simpson's substantial rights.

[29] While it may be acceptable for a "contested case" type proceeding to be presided over by an agency employee who has been designated by the agency as an "independent" hearing officer, even that fiction was not followed here. The 401 Certification was clearly prepared by the DEC staff which was acting as witness, judge and jury simultaneously; the Commissioner's signature was nothing more than a rubber stamp. *See* PC 90.

parties . . . triggers procedural due process concerns [and] more formal, trial-type procedures").

Instead, Simpson has been relegated to an informal, *ad hoc* procedure – solely because of the then-uncorrected oversight of the Vermont Legislature in designating DEC as the State's section 401 agent but not providing any route of review, unlike all other water quality permits – which does not even remotely provide even minimal due process, fair hearing and appellate review rights. In stark contrast the State does provide procedural safeguards, the right to a full hearing, and specific appellate review for everything from unemployment compensation benefits, *see Langlois v. Department of Unemployment and Training*, 149 Vt. 498 (1988), to inmate disciplinary hearings, *see In Re Nash*, 151 Vt. 1 (1988); from regulation of insurance company assets, *see In Re Ambassador Insurance Co.*, 153 Vt. 417, 423 (1989), to termination or non-renewal of teacher contracts, *see Burroughs, supra* fn. 26; from a real estate agent's license, *see In Re DeSautels Real Estate, Inc.*, 142 Vt. 326 (1982), to all manner of land use and environmental permits, *see* 10 V.S.A. §§ 6085, 6089(a) (Act 250 permits) and 24 V.S.A. §§ 4471, 4475 (local zoning or planning permits).

Before Simpson's property rights in the present mode of operation of the dam can be abridged or circumscribed as the State seeks, Simpson must be provided at least *one* effective and procedurally adequate opportunity to make its case. Denial of such an opportunity to marshall its evidence and fully explain and support its proposals violates its rights to procedural and substantive due process, and may even result in an unconstitutional taking of Simpson's property for public regulatory purposes. *Cf.*

*Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987); *Bryant v. Town of Essex*, 152 Vt. 29, 38 (1989); *Perry v. Department of Employment and Training*, 147 Vt. 621, 623-24 (1987); *Petition of Green Mtn. Power Corp.*, 131 Vt. 284, 293 (1973). Accordingly, construing Rule 75 in this apparently unique circumstance to provide for *de novo* review, or alternatively for a remand to DEC, not only appears to be consistent with Vermont law and prior practice, it is the only means available to avoid what would otherwise be a substantial violation under both the United States and Vermont Constitutions. *See e.g., Vincent v. Vt. State Ret. Bd., supra*, 148 Vt. at 534 fn. 2 (Chap. I, Art. 4 of Vermont Constitution construed to provide judicial review of administrative decisions).

(B) Equal Protection

With the passage during the 1991 legislative session of H.353,[30] *de novo* review of all 401 Certifications by the Water Resources Board, with all necessary APA trappings – including a trial-type hearing, the right to confront witnesses, and an impartial and detached decision-maker – has been confirmed. Simpson has thus become the only Section 401 applicant in Vermont history – past, present or future – who will have been denied the right of and opportunity for review of a 401 Certification with a full and fair hearing under minimal evidentiary and procedural safeguards. While it may be that this system of informal DEC review followed by *de novo* review of 401

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[30] *See* 10 V.S.A. § 1024(a) (as amended).

Certifications need not have been provided,[31] the Legislature has in fact done so for everyone but Simpson. Such clearly disparate treatment has no rational basis and cannot be sustained under either the Vermont Constitution, Chap. I, Arts. 4, 7 and 9, or the 14th Amendment to the United State's Constitution. *See, e.g., Alexander v. Town of Barton*, 152 Vt. 148 (1989). The legislative scheme as now enacted for Section 401 appeals "ensnares" one individual entity, without any identifiable public good or benefit, and without furthering any legitimate public purpose. *See Choquette v. Perrault*, 153 Vt. 45 (1989).[32]

Rule 75, V.R.Civ.P., does not deny Simpson a *de novo* hearing, but leaves that determination to be made under

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[31] However, for the reasons just stated, *some* kind of "contested case" license proceeding is required at some stage because of due process concerns.

[32] The State will likely argue that the Legislature was prohibited from allowing retroactive application of its 1991 curative amendment to 10 V.S.A. § 1024(a). First and foremost, it was the Legislature's initial failure to provide a clear administrative adjudicative system in this instance, that created the problem. Second, legislation can in fact be retroactive if the Legislature so states. *See Burlington Firefighters' Assoc. v. City of Burlington*, 149 Vt. 293, 296 (1988). Third, the pending litigation over the Certification was no reason to deny relief; this was a procedural issue only, and remedial legislation would not have affected *the merits* of whether Simpson is entitled to a 401 Certification without continuous spillage. *See Myott v. Myott*, 149 Vt. 573 (1988). Moreover, the Legislature has acted when the effect *is* potentially to help one litigant over another in pending litigation. *See, e.g.*, 8 V.S.A. § 2201 (as amended 1991). Fourth, this would not have been "special litigation" designed to treat Simpson differently; it would have simply insured that Simpson was treated just like all other Section 401 applicants.

other existing law. Nor does Rule 75 prevent a remand to DEC, for the reasons stated. Given all of the circumstances, *de novo* proceedings in this case, or alternatively a remand to DEC, were required to eliminate an otherwise unequal and unconstitutional burden placed on Simpson alone. The judgment below should be reversed and the case sent back to the trial court in accordance with that principle.

## III. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO REMAND THE CASE TO DEC

This case should alternatively have been remanded to DEC, as a matter of the trial court's inherent discretion, to cure evidentiary defects and for DEC to reconsider the entire application. Remands to administrative agencies or tribunals for reconsideration have been granted in a number of cases involving land use and other environmental issues. *See, e.g., In Re Maple Tree Place,* 2 Vt. Law Week 184 (May 17, 1991); *Conservation Law Foundation v. Burke, et al.,* Docket No. 1709-90 CnC (Chitt. Super. Ct., April 10, 1991) (Katz, J.); *In Re Williams Point Yacht Club,* Docket No. S213-89 CnC, (Chitt. Super. Ct., April 18, 1990) (Martin, J.).

As argued previously, the matter can be remanded to DEC, consistent with Rule 75, when it appears there are essential issues that have not been initially decided by the agency, or that "the record" needs to be supplemented with additional evidence to make it complete and provide a thorough basis for the agency's decision. *See In Re Maple Tree Place, supra; Burroughs v. West Windsor Bd. of School Dirs., supra.,* 141 Vt. at 237. *Maple Tree Place* squarely

holds that "trial courts reviewing administrative decisions have the inherent or implied authority to remand the matter to the administrative agency in the interests of justice." 2 Vt. Law Week at 186 (cits omitted). The Court then approvingly quoted the following rationale from the Washington Supreme Court:

> The provision for such a remand would seem to be intended as a safety valve, permitting the reviewing court to require a second look at situations and conditions which might not warrant a reversal, but which, to the court reviewing the record, would indicate to it that the . . . Commission may have acted on incomplete or inadequate information; or may have failed to give *adequate consideration to an alternative route;* or may have weighted its evaluation of the matter under consideration with the *theory of the complete infallibility of its own engineers.*

*Id.* (cit. omitted) (emphasis added).

Those very concerns are evident here. In *Maple Tree Place* the permit applicant wanted the administrative body to reconsider its plan for phasing of a proposed development; here Simpson contends DEC should at the very least reconsider its arbitrary rejection of the proposed spillage management plan, particularly in light of the additional and previously unavailable 1991 evidence of actual water sampling showing no DO violations under critical conditions. This Court found that the permit applicant should be given the opportunity to make

that request of the administrative body, and so affirmed the remand order. *Id.* 186-187.[33]

Most crucially, there has been no objective, substantive consideration by DEC of Simpson's proposed monitoring and management plan, and whether it would in fact reasonably address any legitimate water quality objectives. *Cf. In Re Maple Tree Place.* Also, there is lacking in "the record" and DEC's explanation and findings any rational analysis of or support for either the magnitude or time-duration of required spillage. Finally, there would be no "prejudice" to the people of Vermont from such a remand, in light of recent actual sampling data. PC 77-78.

The trial court misunderstood Simpson's reliance on *Maple Tree Place* in stating that a remand depends on a party being "misled" at the administrative level. PC 35. Simpson has never contended that it was "misled" about DEC staff's "historic resistance" to any type of management plan; in fact, the complaint is just the opposite – DEC's open hostility to the entire concept made any consideration of any specific or detailed proposal a useless gesture. Thus Simpson was in that sense effectively "prevented from proposing [its] plan" in any meaningful way or with any hope of truly constructive dialogue, because DEC was always intent on spillage no matter

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[33] It is ironic that in *Maple Tree Place,* the major countervailing consideration against a remand was the argument that statutory *de novo* review of planning commission decisions prohibits a remand for reconsideration. The Court found it does not. Of course, no such consideration is present here – it is the failure to provide *de novo* review (or some type of "contested case" proceeding) at any stage that is the problem.

what the actual water quality ramifications.[34] Similarly, Simpson made no "deliberate litigation choice" not to propose a detailed management plan; its initial attempt to do so, as early as January 1987, was rebuffed with the clear message that any further efforts would be a waste of time. Nonetheless, Simpson did continue to offer its proposal and to prepare a more detailed plan, without DEC input, resulting in the formal August 1989 draft.

The trial court's analysis under the standards set out in *Maple Tree Place* appears not to address some of the important factors discussed by this Court. Although the use of remand to an administrative agency as a "safety valve" is briefly mentioned, no extended discussion was provided of Simpson's contention that this case is precisely one of those where the agency "may have failed to give *adequate consideration to an alternative route;* or may have weighted its evaluation . . . with the theory of the complete infallibility of its own engineers." 2 Vt. Law Week at 186 (cit. omitted) (emphasis added).

At bottom the justification for remand under *Maple Tree Place* is the "interests of justice," *id.*, which includes

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[34] DEC staff's assertion that an expensive, time-consuming "intensive assimilative capacity analysis" – generally required only for new *sources* of actual pollution discharges – was required, PC 54, was simply DEC's way of providing some cover for its arbitrary decision not to consider any management plan and instead to require maximum spillage. *Id.* The issues of what magnitude and frequency of spillage is necessary to address actual DO concerns, and what basic monitoring and operational equipment is necessary to accomplish that result, are not rocket science and no complex analysis was or is necessary.

but is not limited to the same considerations which would justify a granting of relief from judgment under Rule 60(b), V.R.Civ.P., *see id.* at 187. One of the well-known grounds for relief in such instances is "newly discovered evidence which by due diligence could not have been discovered . . . " Rule 60(b)(2). Subsequent actual sampling above and below the Gilman dam has confirmed that even at low flow conditions near the critical 7Q10 level, and at temperatures which exceed the critical 22°C level assumed in the predictive model, there is still no DO violation at any relevant sampling point, including the crucial Moore Reservoir, and indeed all readings, except those at the mouth of the Johns River upstream, are well above the DO standard of 6.2 mg/l. *See* PC 77-78.

This actual sampling data was simply unavailable during the period the Certification application was pending before DEC, and no amount of diligence on Simpson's part could have gotten it any sooner because river flow levels are entirely beyond their control and during the past several years have not even approached the critical 7Q10 level until the relative "drought" conditions of the summer of 1991. If nothing else, this data casts considerable doubt on the efficacy of the computer model all parties have relied on until now,[35] as well as DEC's basic

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[35] At flow levels of 525 cfs on July 22, 1991 at 12 noon, and temperatures above 25°C, DO readings ranged from 8.5 mg/l just below the dam, to 8.6 mg/l further downstream at the Gilman Bridge, to 8.1 mg/l at the relevant Moore Reservoir sampling station; at 8:00 p.m., the DO readings there were 9.2, 9.1 and 9.2, respectively. PC 77-78. Defendants are certain to complain that Simpson cannot be heard now to discount the

operating premise that this reach of the Connecticut River is already subject to "severe," "critical" or "substandard" DO conditions. A remand to DEC for reconsideration and re-evaluation is entirely appropriate if not mandated by the essential teachings of *Maple Tree Place* and *Burroughs v. West Windsor Board of School Dirs.*

Finally, the trial court's application of *Maple Tree Place* apparently requires Simpson to prove in advance that a remand to DEC "would serve [some] useful purpose." This requirement does not appear in either *In Re Maple Tree Place* or *Burroughs*. The fact that DEC has not yet been persuaded of the efficacy of Simpson's proposals during "informal discussions" during initial permit processing or while this action has been pending (*see* PC 79-80), is neither surprising nor conclusive. DEC has always had one objective: to require continuous spillage for 4½ months for generalized aesthetic and recreational reasons, and because it mistakenly believed until the last minute that the mill's direct discharge entered below the dam. If, however, a remand were required by this Court because Condition A as it stands is arbitrary and unreasonable, or because such reconsideration is required in

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very computer modeling it prepared and submitted during the application process. The real point is that *computer models* are a poor but sometimes necessary substitute for actual field data, and that adequate sampling data simply was not available then but is now. Summary rejection of clearly relevant evidence that simply was not available before, begs the inevitable question whether this process is ultimately a search for the truth and an honest effort to address any water quality problems that actually exist below the Gilman dam, or is it something else entirely?

the name of fairness and due process, such reconsideration is required in the name of fairness and due process, DEC's willingness to consider a management proposal seriously, and pay it more than lip service, would undoubtedly be greatly enhanced.

Secondly, the trial court's reliance in this regard on FERC's preliminary *Environmental Assessment* in this matter – which the State submitted below – only complicates the issues. *See* PC 35-36. FERC's analysis is ostensibly independent and separate from DEC's determination under Section 401, and obviously occurred well after the "record" in this case is asserted to have closed; it is certainly nothing that DEC relied on in continually rejecting Plaintiffs' voluntary spillage proposals from January 1987 on. To suggest that DEC staff would not give the issue a full and fair reconsideration on remand because FERC staff had purportedly come to its own conclusions, would fly in the fact of ordinary presumptions that matters are not prejudged, even by administrative agencies, until all the evidence is heard. Additionally, as noted below, Simpson has strongly objected to the EA issued by FERC staff and it has yet to be adopted by the Commission itself.

On the other hand, if such emphasis is given to FERC's preliminary comments regarding Simpson's proposed management plan, then FERC's approach to such issues generally becomes fair game. In fact FERC does *not* generally consider such management plans to be "unworkable" or "flawed," and only recently has indicated it will accept, if not impose a quite similar DO monitoring and "as necessary" spillage requirement on

the Central Vermont Public Service hydroelectric project on the Lamoille River at Clarks Falls.[36] *See* RA, Attachment B to Appellants' October 21, 1991 Motion to Amend. It is thus questionable whether the EA prepared by FERC staff in this case is really an independent analysis of the water quality issues, or simply FERC staff's adoption of Vermont DEC's flawed analysis.

## IV. EVEN ON "THE RECORD" INFORMALLY CREATED BY DEC, THE CONTINUOUS SPILLAGE REQUIREMENT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND IS ARBITRARY AND CAPRICIOUS

Simpson disputes that the traditional rule of deference paid to administrative agency determinations, is applicable here because no formal trial-type or "contested case" proceedings were held below. Indeed that defect contaminates the whole case and requires reversal and remand to the trial court to hold *de novo* proceedings, or

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[36] The Lamoille Project's monitoring requirements and "as necessary" spillage condition is not FERC's first or only approval of such management plans. In 1989 FERC licensed 14 separate projects in the Upper Ohio River basin, each with their own similarly crafted monitoring and operational plan "whereby project operation could be rapidly altered to ensure maintenance of a minimum DO concentration" in downstream segments. *See The City of Pittsburgh,* Order Issuing License, 48 FERC ¶61, 362 at pg. 62, 302 (Sept. 27, 1989). *See also In Re Potomac Edison Co.,* 34 FERC ¶61,085 (1986), and Order on Rehearing (June 7, 1991) (licensee simply required to maintain minimum DO level of 5.0 mg/l, through monitoring and whatever means chosen by licensee).

to DEC for further review and reconsideration. *See* Points I-III, *supra.*

The cases generally cited by the State for the contrary proposition – *Caledonian Record v. DET,* 151 Vt. 256 (1989); *In Re Tariff Filing of Green Mountain Power,* 138 Vt. 213 (1980); *Whitcomb v. DET,* 147 Vt. 525 (1986) – all involved appeals on a record created before an independent quasi-judicial board or tribunal (e.g., the Employment Security Board, or the Public Service Board), with established evidentiary and procedural rules and an opportunity to be heard in a careful and deliberate manner. If one traces through the chain of citations found in the Vermont decisions discussing the "scope of review" in administrative appeals, ultimately *every single one* depends on the basic principle of deferential review and presumptive validity established in cases where there was a hearing before and record created by a quasi-judicial board, or at least a "contested case" type proceeding within the agency under the Administrative Procedure Act, 3 V.S.A. §801 *et seq.* ("APA"). *See, e.g., In Re Handy,* 144 Vt. 610 (1984); *In Re Devoid,* 130 Vt. 141 (1972).

*State Dept. of Taxes v. Tri-State Ind. Laudries, Inc.,* 138 Vt. 292 (1980), is an earlier administrative review case that is often cited as the source of the judicial deference/presumptive validity standard. *Tri-State* involved an appeal of a withholding tax deficiency assessment; the appeal to Superior Court followed a "contested case" hearing in the Department of Taxes under the APA. *Id.* at 293, 295. This Court was careful to premise its holding on that fact:

> [W]here the parties have had an opportunity to develop the facts before the agency, the function of the courts is solely to review the contested case on the record established below . . . These [APA] procedures include, *inter alia*, notice of the hearing; opportunity for all parties to present evidence, cross-examine witnesses, and respond on all issues involved according to the rules of evidence normally applied in superior court; and maintenance of a full record of all pleadings, rulings, evidence, exhibits, matters officially noticed, offers of proof, and findings and decisions.

*Id.* at 295 (cit. omitted). Indeed an actual "transcript" of testimony was produced in *Tri-State*, as is the case in almost all appeals from "contested case" proceedings.

This Court has more recently affirmed that where this fundamental premise for the presumptive validity/judicial deference standard does not exist, the administrative decision is not treated as a Delphic oracle and will be reversed. *See In Re Petition of Burlington Electric Dept.*, 149 Vt. 300, 303 (1988). In that case the Court unequivocally stated that:

> this tenet [the presumptive deference standard] only holds true where the administrative proceedings have provided notice and an opportunity to be heard . . . 'the parties [are] given an adequate opportunity to prepare and respond' to the controlling issues . . . the findings . . . [are] 'based exclusively on the evidence and on matters officially noticed . . . ' [and] there [is] 'full disclosure of the criteria underlying' the order.

*Id.* at 303 (cits. omitted).

The proceedings below lack all of the essential attributes noted in both *Tri-State* and *BED*. There was no real and meaningful opportunity to be heard and create a formal record for review, especially since the "controlling issues" and "underlying criteria" were constantly shifting, particularly late in the process when the Certification was about to be issued in final form. As even DEC's "record" demonstrates, at the literal eleventh hour – after Simpson's consultants had reworked and refined DEC's "DOSIM" model with reasonably accurate input variables, which then showed *no* downstream DO violations immediately below (i.e., for 1.5 miles) or attributable to the dam, and at worst a D.O. "sag" of only 0.4 mg/l of unknown cause 2.4 miles into Moore Reservoir – "diurnal flux" suddenly became the issue.[37] Simpson attempted to respond informally in the little time left; DEC's response was that it "understood the concept" of why "diurnal flux" should not matter from a regulatory standpoint, but simply "wouldn't accept the argument." *See* RA, July 1989 KA Report, at 13-14 & App. B Tel. Notes (7/19/89).

While Simpson disputes, for all of these reasons, application here of the judicial deference/presumptive validity standard, there can be distilled from some of the

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[37] The State's essential premise on "diurnal flux" is similarly unsupported by any evidence or objective analysis in "the record" or the Certification itself. DEC staff simply "assumes predicted DO analysis would be in the middle of this range [i.e., the computer model results]." RA, July 1989 KA Report, at App. B Tel. Notes (6/21/89). In this way an additional 0.8 mg/l of DO was required to be compensated for, which constitutes 2/3 of the purported "violation." *See* PC 67.

same cases a "standard of review" that is more appropriate to this case if Simpson is, as a last resort, relegated to that type of appellate review. In that event Simpson carries the burden of demonstrating that DEC's Condition A is unsupported by the evidence or is arbitrary or capricious. That burden will have been met by showing that based upon the **entire** "record," with the weight of detracting evidence factored in as well, *see* 2 Koch, *supra*, §9.2, at 73 & fn. 13 (1990 Supp.), there is no fair and reasonable basis for DEC's findings and conclusions on this issue. *Tri-State, supra*, 138 Vt. at 294; *In Re Orzel*, 145 Vt. 355 (1985); *Clark v. Weinberger*, 389 F.Supp. 1168 (D.Vt. 1974), *aff'd*, 511 F.2d 1390 (2d Cir. 1975). In other words, Simpson can show that DEC's Condition A is not supported by "substantial evidence" if it demonstrates continuous spillage for 4½ months is based on evidence which no reasonable person would accept as adequate to support DEC's conclusion. *In Re McShinsky*, 153 Vt. 586, 589 (1990).

When the uncontested evidence in this "Record" is that the theoretical "sag" of 0.4 mg/l in DO levels more than two miles downstream of the Gilman dam is unlikely to occur 70% of the time or better and only in July and August, if at all,[38] and when the evidence is clear that Simpson for more than three years proposed to implement any reasonable monitoring and spillage plan that would correct any actual or anticipated DO deficiency in Moore Reservoir (even though the Gilman dam

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[38] It is conceded by DEC that at flows of 800 cfs or greater, which do occur 70% or more of the time, no DO violation will occur. PC 12-13.

has not been shown to be the cause of that "sag"), imposition of Condition A requiring continuous spillage of 210 cfs every minute for 4½ months is arbitrary, unreasonable, and unsupported by any relevant evidence which a rational, unbiased person would find adequate. As the Certification itself admits: "No-attempt was made to determine the mixed [DO] concentrations necessary at different river discharges in order to assure that the downstream [DO] sag remains above standards." PC 13.

Even if the impact of "diurnal flux" is included, it is still evident that, irrespective of the necessary *amount* of spillage (and that is all that "diurnal flux" adds to the debate; whether a violation could occur at all is still dependent entirely on the "DOSIM" computer prediction), the "continuous" and "June 1 to October 15" aspects of Condition A are wholly irrational, overbroad and lack any fair and reasonable basis in "the record." It is clearly unnecessary in both magnitude of spillage and time of duration to address any predicted DO "sag" in Moore Reservoir – even assuming, which Simpson does not concede, that the theoretical DO "sag" in Moore Reservoir can be traced back to its doorstep at all.

Thus, while the punishment here does not even fit the crime, the "record" fails to demonstrate that a crime has actually occurred or that Simpson is the guilty party. The most telling deficiencies, both analytically and/or factually, are as follows:

(A) DEC Was Pre-Disposed To Impose A Spillage Requirement Based On Fundamentally Erroneous Misconceptions About The River And Simpson's Facility

In 1985 DEC issued to G-P a previous Section 401 Certification in connection with G-P's replacement of one of the four turbine/generator units at the project. In that 1985 Certification DEC stated, in part:

> Due to pollutant loading and reduced re-aeration caused by impounded waters and diversion of flow at dams, there is a critical dissolved oxygen problem in the Connecticut River. . . . the Department will investigate opportunities to increase re-aeration at this site during the relicensing process.

PC 40. As of April 1985, however, the only water quality study actually conducted of the upper Connecticut River indicated only that "*model predictions* show that Class B standards may be violated in a substantial portion of the study area during *critical low flow conditions.*" *See* RA, 1983 Metcalf & Eddy ("M&E") Modeling Study, at 3-1 (emphasis added). Moreover, the same engineers clarified their computer model predictions and conclusions in a subsequent report prepared for these licensing proceedings:

> Modeling results indicated probable water quality standard violations under critical low flow conditions for a substantial portion of the study area. . . . the large DO [dissolved oxygen] sag from about river mile 324 to 312[39] is caused by

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[39] The Gilman dam is downstream, at about river mile 300.

> BOD [biochemical oxygen demand] exertion from the *James River discharge* and by *sediment oxygen demand* through this region.

*See* RA, 1985 M&E Study, at 2-4 (emphasis added). Clearly it was the reach well *above* the Gilman dam that was the focus of concern.

The James River Corporation paper plant in Groveton, New Hampshire on the Upper Amonoosue River, which empties into the Connecticut River upstream of the Gilman project, has always been known and acknowledged by DEC to be the largest single cause of dissolved oxygen deficiencies in the upper Connecticut River:

> The major affector of water quality in this reach was the James River Corporation paper plant in Groveton, New Hampshire. . . . the dissolved oxygen levels incoming to any given project along this reach are very dependent upon the magnitude of the James River discharge.

PC 45-46. M&E 1983 concluded, however, that actual "dissolved oxygen measurements taken above and below the Georgia-Pacific Dam indicate a decrease [in DO levels] averaging 0.1 mg/l." *Id.*, at 2-22. These measurements were taken with the project in a normal operating mode – i.e., passing all or most flows through the turbines – and demonstrate that any DO deficit actually caused by the Gilman project *in 1983* was "negligible" (an average of only 0.1 mg/l) and certainly not "critical." Intensive actual DO measurements over 48 hours in August 1985, above and below the Gilman Dam, further proved that at flows of approximately 800 cfs, there is *no*

DO deficit caused by the project itself, and certainly not a "critical" one.[40]

The "record" relied on by DEC thus has never supported DEC's 1985 premise that in this specific segment of the Connecticut River applicable to the Gilman project, there is a "*critical* dissolved oxygen problem" due to "reduced re-aeration caused by impounded waters and diversion of flow at dams." PC 40. That incorrect and unsupported premise has never been abandoned by DEC, and from 1985 to the present has compelled DEC to "investigate opportunities to increase re-aeration at this site" – i.e., seek to condition this Section 401 Certification with a continuous spillage requirement – without regard to objective evidence of the Gilman project's actual effect, or lack thereof, on water quality standards. From the outset DEC knew its stance was flawed and accordingly this Certification would be "a major battle" (PC 58) and that Simpson "disputed our findings and may appeal" (PC 90).

Thus, in April 1987, before Simpson had formally submitted its application for 401 Certification, and before either DEC or Simpson's consultants had performed any of the more current computer model analyses of the Gilman project's actual effect on water quality, DEC again confirmed its intention to impose a continuous spillage requirement. PC 54. A year later, which was still before any formal application, a continuous spillage requirement

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[40] Actual DO readings below the dam in 1985 ranged from a low of 6.5 mg/l to a high of 8.05 mg/l at the bridge about 1,800 feet downstream of the dam, and from 7.1 mg/l to 9.45 mg/l even further downstream. *See* RA, State's Exh. I, App. C.

was still uppermost on DEC's agenda. PC 56. The initial draft Certification prepared by DEC in January 1989, well before *any* of the June 1989 computer modeling analyses (upon which DEC now purports to base the permit) had been performed, sought to impose a continuous spillage requirement of 185 cfs. *See* RA. State's Exh. L.

There is no "record" evidence that DEC independently conducted more than one run of its own "DOSIM" computer model analysis of predicted water quality impacts caused by the Gilman dam project, in November 1988. PC 59-64. The only additional computer modeling analysis, which was done in *June 1989,* was actually performed by Simpson's consultants, using modified input parameters dictated by DEC. *See* RA, July 1989 KA Modeling Study, at 7-11, 15-16, and Appendix B. Yet before that final analysis was even undertaken, let alone completed, DEC in January and in May 1989 had already decided to impose a continuous spillage requirement of 185 cfs, *see* RA, State's Exh. L.[41] The compelling conclusion is that since at least 1985 DEC has had the unswerving intention to require significant, continuous spillage at the Gilman dam, come hell or high water.

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[41] The purported "sag" was 1.0 mg/l in the only DOSIM run of record prepared by DEC (11/88) (PC 63), compared to 0.4 mg/l in "Run E" (6/89) (PC 76). Meanwhile, the spillage requirement increased inversely, from 100 cfs to 185 cfs in May 1989, to 210 cfs. in June 1989.

(B) DEC's "DOSIM" Model, Even After Refinement By Simpson's Consultants, Does Not Demonstrate A Water Quality Violation Caused By The Gilman Dam

"Run E" of the "DOSIM" model prepared by Kleinschmidt Associates predicted a theoretical "sag" in DO levels more than two miles downstream of the dam in Moore Reservoir, of approximately 0.4 mg/l, under modeled assumptions for critical low flows, high summer temperatures, and maximum upstream wastewater discharge levels. Nothing more, nothing less. The model simply does not and cannot identify the "cause" of this temporary "sag" in DO levels well into Moore Reservoir,[42] and there is no real analysis in "the record" or discussion in the Certification to the contrary.

The Gilman dam and hydro-electric facility, and its usual "no spill" mode of operation at river flows between 130 cfs and 2,850 cfs when all water passes through the turbines, passes all river flows "instantaneously" and

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[42] The "DOSIM" model also cannot calculate or account for the effect of "diurnal flux" which DEC latched onto late in the permitting process. Nowhere in "the record" is there any mention of "diurnal flux" as a basis for spillage until June 1989. That DEC staff may have latched on to data earlier submitted to buttress their argument, does not show that the State's early DOSIM modeling "accounted for diurnal flux," because the model itself cannot. *See* PC 67. Finally, the State itself has been inconsistent on this point. First it said the January 1989 draft certification included "diurnal flux," when it clearly did not; then it admitted the issue resulted from the discussions and further modeling in June 1989 (which is precisely what Simpson has said all along).

does not have any significant storage capacity.[43] The only actual measurements of DO levels in this segment of the river presently in "the record" – on August 12-14, 1985, at flows of 800 cfs – demonstrate that DO levels for flows downstream of the Gilman dam, before entering Moore Reservoir, generally equal or exceed corresponding DO levels for incoming flows upstream at the head of the Gilman impoundment. Even with "diurnal flux" factored in there is no actual or *measured* violation of the DO standard downstream of the dam at any point before the river enters Moore Reservoir.

Moreover, the hydro-electric facility does not add or "load" *any* pollutants whose effect may be delayed or not become fully apparent until later – unlike, for example, the James River paper mill discharge which is acknowledged to be the "major affector of water quality" over this entire segment of the river. Therefore, any predicted "sag" in D.O. some two-plus miles downstream in the Moore Reservoir cannot be caused by the Gilman dam itself,[44] but must be due to (a) the influence of Moore

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[43] There is in fact spillage at the Gilman dam from time to time even under present operating conditions. The turbine capacity is 2,850 cfs, and any river flows in excess of that – the average mean flow is 2,915 cfs, *see* RA, State's Exh. F, at A-3 – are spilled. Moreover, river flows exceed 2,850 cfs almost 30% of the time during the relevant summertime period. *Id.* at A-12.

[44] The State has hopefully given up its attempt to premise its "liability" finding on the Gilman dam's "destruction" of the "natural re-aeration potential" of the river as if there were no dam. Since the dam was built in 1900, there is obviously *no* objective evidence which could ever be obtained or developed to support such an analysis, and the Certification contains no such justification. (DEC has tried to argue that "the record"

Reservoir, (b) the influence of pollution added by upstream sources, (c) both of those factors, and/or (d) some additional scientific mechanism(s) or variable(s) never identified or discussed by DEC or shown to be Simpson's responsibility.[45]

(C) The "DOSIM" Model Itself Does Not Predict The Need For Or Support DEC's Imposition Of A Continuous Spillage Requirement Of 210 cfs From June 1, To October 15

"Run E" of the State's model simply predicts a theoretical "sag" in dissolved oxygen levels of 0.4 mg/1 under certain assumed adverse conditions, which occurs (if at all) 2.4 miles into Moore Reservoir. Period. Moreover, that modeled result exists only when *all* of the input conditions actually occur, but the model cannot and does not predict the time-frame when those variables might actually occur simultaneously (as they must). There is *no* evidence in "the record" or any discussion in the Certification itself which explains, supports or justifies how and why DEC concluded that spillage must occur *every minute for a period of 4½ months*. Similarly, the *amount of spillage* selected by DEC – 210 cfs – is not and cannot be predicted by the "DOSIM" model. Rather, that aspect of

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[45] Simpson and its consultants *never* agreed the Gilman project causes any DO violation, and they certainly *never* undertook any modeling efforts with the "assumption" that there was a downstream violation for which Simpson is responsible. The State's predictable assertion in that regard, and the trial court's literally incredible finding to that effect, is clearly contradicted by the "record" and every single submittal made by Simpson below.

Condition A is an amalgamation by DEC of (a) the "Run E" model result, (b) DEC's contentions regarding "diurnal flux," and (c) DEC's use of a "re-aeration curve" produced in a 1985 study whose author cautioned was not reliable under all conditions. PC 67.

In formulating its requirement for continuous spillage over the dam of 210 cfs from June 1 to October 15 each year, DEC appears to have relied heavily on "re-aeration curves" contained in the M&E 1985 study. PC 62. Actual re-aeration *potential* over the Gilman dam, however, would be subject to several variables not considered by M&E in producing the Figure 9 curves, which are actually based on only two observed measurements and are otherwise wholly theoretical:

> These curves are mainly based on theory, supported by limited data. . . . It should be noted that *a separate curve* such as those shown in Fig. 9 *is required for each condition of background river flow and dissolved oxygen concentration.*

*See* RA, M&E 1985 at 18 (emphasis added). The "re-aeration curve" upon which the State so prominently relies for its final determination of the *amount* of necessary spillage, was clearly never intended to bear the weight the State attaches to it.

Moreover, DEC staff appears to have merely "eyeballed" the Fig. 9 chart, and to have committed a significant mathematical error in the process. In a telephone discussion with Simpson's consultants, DEC staff said it had done a "mass balance" analysis to derive the necessary amount of spillage (*see* PC 68). There is no evidence in "the record," nor any discussion in the Certification

itself, of any such "mass balance" analysis performed by DEC to support Condition A. Also, despite DEC staff's statement that the required DO concentration at the base of the dam would have to be 7.4 mg/1 (the 1.2 mg/1 "deficit" (actually, a 0.4 mg/1 DO "sag" plus 0.8 mg/1 "diurnal fluctuation") plus the minimum DO standard of 6.2 mg/1), *see id.*, the final spillage condition was then calculated on the basis of requiring "8.4 mg/1 at the toe of the dam." *See* PC 67. Consequently, DEC's usage of the Fig. 9 re-aeration curve – itself unsupported by sufficient fact or reason – was doubly infected by the wrong input variable – i.e., 8.4 mg/1 of DO instead of 7.4 mg/1.

These are but the most egregious examples of how this 401 Certification, and particularly its continuous spillage requirement, is wholly unsupported even by "the record" informally created by DEC. Any one of these instances of inadequate factual support is fatal to the Certification and Condition A. Of course, overreaching everything is the utter unreasonableness and arbitrariness of a 4-1/2 month continuous spillage requirement, given the demonstrably infrequent occurrence of the necessary conditions for the modelled DO "sag," even if all other findings and conclusions of DEC were to be sustained.

## V. 401 CERTIFICATIONS ARE LIMITED SOLELY TO CONSIDERATION OF DEMONSTRABLE WATER QUALITY VIOLATIONS

Section 401 of the Clean Water Act, 33 U.S.C. §1341, is relatively concise in its requirements: Any applicant for a federal license or permit which involves a discharge into

any navigable waters, must obtain from the state regulatory body where the discharge occurs a "certification" that the discharge will not cause any violation of water quality limitations and standards developed in accordance with the Act. *Id.*, §1341 (a) (1). The only substantive provisions of the Act that are expressly referenced, are sections 1311 ("Effluent limitations" and "discharge of any pollutant"), 1312 ("Water quality related effluent limitations"), 1313 ("Water quality standards and implementation plans"), 1316 ("National standards of performance" for the "greatest degree of effluent reduction . . . achievable through . . . the best available demonstrated control technology"), and 1317 ("Toxic and pretreatment effluent standards"). All of these substantive provisions plainly relate to objective water quality issues and elimination of water pollution. Under § 1341(d), any such

> certification . . . shall set forth any effluent limitations and other limitations, and *monitoring requirements*[46] necessary to assure that any applicant . . . will comply with any applicable affluent limitations and other limitations [imposed by states pursuant to §§1311-1317 of the Act]

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[46] DEC's "historic resistance" to monitoring and management of water quality based on that monitoring, is clearly inconsistent even with the plain language of §401. Any §401 condition which includes a monitoring and management plan would be just as effective and just as enforceable as any other §401 condition related to water quality. Moreover, DEC's over-zealous concern with enforcement of and compliance with such a condition, *see* PC 90, exhibits a highly cynical and unreasonable view of the world in general and Simpson in particular.

> and with any other appropriate requirement of State law set forth in such certification.

*Id.* (emphasis added). Vermont has duly enacted applicable water quality standards. PC 81-89, and there is no dispute that those standards and the Act generally are applicable to the Gilman dam.

The sole issue is whether the Gilman dam during normal operation causes any violation of Vermont water quality standards, and the *only* such standard that has every been put in contention is the DO standard. The Standard requires that DO levels in the river be maintained at all times at a minimum of 6.2 mg/1 (70% saturation at 22°C), or – if existing water quality in the relevant river segment exceeds the minimum – that that existing higher level not be adversely affected by the facility under the so-called "anti-degradation" provisions. *See* Vt. WQS §§1-03, 3-01, PC 86-88. Once the water quality standards are set, the *only* question is whether a particular project complies with those standards or not; as the United States E.P.A. and even the State acknowledges. "[w]hen [water quality] criteria are met, water quality will generally protect the designated use." *See* 40 C.F.R. §131.3(b).

The State's extensive discussion of such things as the Clean Water Act's preamble, the declared Congressional intent, the "remedial" nature of the Act, and "beneficial uses" and "beneficial values," serves no purpose other than to distract the Court from the real issue at hand, which is compliance with the technical DO standard. Courts around the Northeast and elsewhere have now consistently rejected other states' attempts to go beyond

the clear and unambiguous focus of §401 on water quality issues alone. *See e.g., Fourth Branch Associates v. Department of Environmental Conservation,* 550 N.Y.S.2d 769, 146 Misc.2d 334 (N.Y.Sup.Ct., Albany Co., 1989),[47] *Matter of Long Lake Energy Corp. v. New York State Dept. of Env. Cons.,* 164 A.D.2d 396, 563 N.Y.S.2d 871 (3d Dept., App. Div., 1990); *Matter of Niagara Mohawk Power Corp. v. New York State Dept. of Env. Cons.,* Index No. 7218-90 (N.Y.Sup.Ct., Albany Co., April 1, 1991); *Commonwealth of Pennsylvania v. City of Harrisburg,* 133 Pa. Cmwlth. 577, 578 A.2d 563 (Pa. Commonwealth Ct., 1990); *Arnold Irrigation Dist. v. Dept. of Env. Quality,* 79 Or. App. 136, 717 P.2d 1274, 1279 (Or. Ct. of Appeals, 1986); *but cf. Bangor Hydro-Electric Company v. Bd. of Env. Protection,* ___ A.2d ___ (Me. Supreme Jud. Ct., 7/30/91). This development has been noted approvingly by FERC. *See In Re Central Main Power Co.,* FERC Reports ¶61,033, at p. 61, 172-173 (1990). Most importantly, the focus on "primary measures of water quality" in the form of the technical WQS limits, and "an actually detectable or measurable" change in water quality instead of "some theoretical impact" downstream, has been recently confirmed to be the touchstone of Section 401 analysis. *See Arkansas v. Oklahoma, supra,* 60 U.S.L.W. at 4181 (cits. omitted).

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[47] The Court in *Fourth Branch Associates* also specifically held that the reference in §1341(d) to "other appropriate requirements of state laws" merely refers to other water quality standards, separate from those established under the Clean Water Act, which may in fact be stricter. Here Defendants have pointed to no such separate standards, but rely only on the Vermont WQS standard of 6mg/1 D.O. or 70% of saturation.

Accordingly, to the extent both DEC and the court below have alternatively attempted to justify Condition A of the Certification by vague, non-specific references to "aesthetics" and/or "recreation" – *see* PC at 18, 33 – such efforts are inadequate as a matter of law. Moreover, the complete lack of any specific discussion of these characteristics, and how they would or would not be affected by spillage or lack thereof, makes it clear these issues were an after-thought and purely make-weight. For example, when "aesthetics" is an appropriate concern, it is an analysis within the technical standards themselves of the physical attributes of the water itself, *see Arkansas v. Oklahoma, supra,* not some *ad hoc* and subjective consideration of how a cascading dam might look nice to hikers, canoeists, or other tourists.

## VI. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS WERE CLEARLY ERRONEOUS IN NUMEROUS MATERIAL INSTANCES

Inasmuch as the trial court did not hold a *de novo* trial or other evidentiary proceeding below, and since the arguably applicable standard of appellate review focuses on whether *the agency's* decision is supported by substantial evidence or is arbitrary and capricious,[48] in a very practical sense the trial court's decision is of little moment and need not be accorded the traditional "clearly erroneous" deference required by Rule 52(a), V.R.Civ.P. Indeed, such a procedure, at least as applied here, would

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[48] Simpson repeats its overriding objection to the application of that principle here, for the reasons previously stated.

only compound the substantial defects which already infect this case. How could any appellant in these circumstances possibly meet the double burden of showing that the trial court's findings and conclusions are "clearly erroneous" if the court below only has to find that the agency's decision is not arbitrary and supported by "some evidence" in the record? The better approach would seem to be that this Court sits just as the trial court did, and using the same standard of review directly examines the agency decision. This Court's administrative review decisions do not suggest otherwise, *see* cases cited *supra* at 33-36, even when the vehicle for review is Rule 75, V.R.Civ.P.

Nonetheless, Simpson has previously set forth some eleven (11) of the most telling areas in which the trial court's findings and conclusions *are* clearly erroneous and not supported by the administrative "record," or are even flatly inconsistent with themselves. *See* Plaintiff's Motion to Amend and/or Make Additional Findings and Conclusions, dated October 21, 1991, in the Record on Appeal. For the sake of brevity those errors and omissions will not be repeated here.

## CONCLUSION

For all of the reasons and on any one or more of the grounds stated herein, the judgment below should be reversed and this case remanded to the trial court, either for a *de novo* hearing or for further remand to DEC for reconsideration and further review of the Certification and Condition A. Any such proceedings below must include Simpson's ability to marshall *all* of the relevant

evidence, including that obtained since 1989, and to fairly present its management plan. Alternatively, Condition A requiring continuous spillage should simply be vacated as wholly lacking in evidentiary support, and as arbitrary and capricious, and the Certification otherwise affirmed.

DATED: Burlington, Vermont
March 26, 1992

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